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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 865.

WILLIAM NEAL, PLAINTIFF IN ERROR,

vs.

THE STATE OF DELAWARE.

IN ERROR TO THE COURT OF OYER AND TERMINER OF NEW CASTLE COUNTY, STATE OF DELAWARE.

FILED SEPTEMBER 21, 1880.

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1 To the Honorable John M. Harlan, Associate Justice of the Supreme Court of the United States.

The petition of William Neal, humbly represents unto your honor that on the twenty-seventh day of May, A. D. 1880, a final judgment, was rendered by the court of oyer and terminer of the State of Delaware, sitting in and for New Castle County, at the May term thereof, held in the city of New Castle in said State on said day against your petitioner, in a criminal proceeding, in which your petitioner was defendant, and the State of Delaware was plaintiff.

Your petitioner further represents that in the said suit there was drawn in question the validity of a statute of, and an authority exercised under, said State, on the ground of their being repugnant to the Constitution and laws of the United States, and the decision was in favor of such their validity; and wherein was drawn in question the construction of a clause of the Constitution, and a statute of the United States, and the decision was against the title, right, privilege, and exemption specially set up and claimed under such clause of the said Constitution and statute; and that there was error in the said judgment of the said court of oyer and terminer of the State of Delaware, sitting in and for New New Castle County, that being the highest court in said State having jurisdiction of the said suit.

Your petitioner is advised that he is entitled to have the same reviewed and corrected by the Supreme Court of the United States,

2 and respectfully represents to your honor that there is error in the said judgment of the said court of oyer and terminer of the State of Delaware, sitting in and for New Castle County, in that the said decision respecting the said statute of, and authority exercised under, said State, and respecting the title, right, privilege, and exemption specially set up and claimed under such clause of the Constitution and statute of the United States, was rendered against instead of in favor of your petitioner, as will more fully appear by inspection of the transcript of the record in said cause accompanying this petition.

Wherefore your petitioner prays your honor to allow him a writ of error to the said court of oyer and terminer of the State of Delaware, sitting in and for New Castle County, so that the said judgment and decision therein may be caused to come before the said Supreme Court of the United States, when the whole matter in suit may be reviewed.

And your petitioner will ever pray, &c.

WILLIAM NEAL, *Petitioner.*
By ANTHONY HIGGINS, *Counsel.*

AUG. 21, 1880—Examined and writ of error allowed.

JOHN M. HARLAN,
Associate Justice Supreme Court U. S.

2½ (Indorsed:) Sup. Court U. S., 1880., October term. No. 865. Neal vs. State of Delaware. Petition for writ of error. Filed 21 Sept'r, 1880.

(Indorsed:) William Neal, plaintiff in error, vs. the State of Delaware, defendant in error. Petition for writ of error.

3 Know all men by these presents, that we, Anthony Higgins and John M. Dunn, both of the city of Wilmington and State of Delaware, are held and firmly bound unto the State of Delaware in the full and just sum of two hundred and fifty dollars, to be paid to the said State of Delaware, its certain attorney, executors, administrators, or assigns, to which payment, well and truly to be made, we bind

ourselves, our heirs, executors, and administrators, jointly and severally by these presents. Sealed with our seals, and dated this sixth day of August in the year of our Lord one thousand eight hundred and eighty.

Whereas lately at a court of oyer and terminer of the State of Delaware, sitting in and for New Castle County, in a suit depending in said court, between the State of Delaware, plaintiff, and William Neal, defendant, judgment was rendered against the said William Neal, and the said William Neal having obtained a writ of error, and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said State of Delaware, citing and admonishing it to be and appear at a Supreme Court of the United States, to be holden at Washington, the second Monday of October next.

Now, the condition of the above obligation is such that if the said William Neal shall prosecute said writ of error to effect, and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

ANTHONY HIGGINS. [L. S.]
JOHN M. DUNN. [L. S.]

Sealed and delivered in presence of—
A. T. STONE.

Approved by—

JOHN M. HARLAN,
Associate Justice Sup. C't U. S.

(Indorsed:) William Neal, plaintiff in error, vs. the State of Delaware, defendant in error. Appeal bond.

(Indorsed:) Supreme Court U. S. 1880, October term. No. 865. Neal vs. State of Delaware. Writ of error bond. Filed 21 Sept., 1880.

4 The United States of America to the State of Delaware, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the court of oyer and terminer of the State of Delaware, sitting in and for New Castle County, wherein William Neal is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable Morrison R. Waite, Chief Justice of the United States, this twenty-first day of August, in the year of our Lord one thousand eight hundred and eighty.

JOHN M. HARLAN,
Associate Justice Sup. C't U. S.

5 Service of the within citation is hereby accepted this 24th day of August, 1880.

GEO. GRAY,
Att'y Gen'l of State of Delaware.

Service of the within citation is hereby accepted, this 24th day of Aug., 1880.

JOHN W. HALL,
Gov. of Delaware.

6 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the court of oyer and terminer of the State of Delaware, sitting in and for New Castle County, greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said court of oyer and terminer, sitting in and for New Castle County, before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between the State of Delaware, plaintiff, and William Neal, defendant, wherein was drawn in question the validity of a statute of, and an authority exercised under, said State, on the ground of their being repugnant to the Constitution and laws of the United States, and the decision was in favor of such their
7 validity; and wherein was drawn in question the construction of a clause of the Constitution and a statute of the United States, and the decision was against the title, right, privilege, or exemption, specially set up or claimed under such clause of the said Constitution and statute, a manifest error hath happened, to the great damage of the said William Neal, as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all th ngs concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the second Monday of October next, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right and according to the laws and custom of the United States should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the 21st day of August, in the year of our Lord one thousand eight hundred and eighty.

Issued August 21st, 1880.

[SEAL.]

S. RODMOND SMITH,
Clerk of the Circuit Court of the United States for the District of Delaware.

Allowed by—

JOHN M. HARLAN,
Associate Justice, Supreme Court of the United States.

Aug. 21, 1880.

8 A true copy and an authenticated transcript of the record and proceedings of the plea, whereof mention is within and *and* above made, with all things concerning the same, to the honorable the judges of *of* the Supreme Court of the United States, at the city of Washington, in the District of Columbia, in the United States of America, at the day within contained, I, Edwin R. Cochran, clerk of the court of oyer and terminer of the State of Delaware, sitting in and for New Castle County, do herewith transmit and send in accordance with the command of the within writ.

In testimony whereof I have hereunto set my hand and affixed the seal of said court of oyer & terminer of the State of Delaware, sitting

in and for New Castle County, this day of September, in the year of our Lord one thousand eight hundred and eighty.

[SEAL.] EDWIN R. COCHRAN,
Clerk of the Court of Oyer and Terminer.

9 In the court of oyer and terminer of the State of Delaware, in and for New Castle County.

At a court of oyer and terminer of the State of Delaware, begun and held at New Castle, in and for New Castle County, on the tenth day of May, in the year of our Lord one thousand eight hundred and eighty. Among the records and proceedings of which is the following:

Pdictment for rape. True bill.

THE STATE OF DELAWARE } No. 14.
vs.
WM. NEAL.

For the State: George Gray, esqr., attorney general; Alexander B. Cooper, esqr., deputy attorney-general.
For the defence: Anthony Higgins, esqr.

Be it remembered that heretofore, to wit, on the thirteenth day
10 of May, in the year of our Lord one thousand eight hundred and eighty, the State of Delaware, by George Gray, esquire, the attorney general, comes into court here and moves the court here to issue the writ of the said State of certiorari, directed to the judges of the court of general sessions of the peace and jail delivery of the said State for New Castle County, commanding them to send up to the said court of oyer and terminer an indictment found against a certain William Neal for the felonious and wilful rape of *of* one Margaret E. Gosser, at the county aforesaid, with all things touching the same.

And therefore, to wit, on the said thirteenth day of May, in the year aforesaid, the court here did order the writ of the State of Delaware of certiorari, in words following, to wit:

The State of Delaware to the judges composing the court of general sessions of the peace and jail delivery of the said State, greeting:

11 Whereas, at the May term, A. D. 1880, of the said court, held at New Castle, in and for the county of New Castle, an indictment was found against a certain William Neal, negro, for the felonious and wilful rape of one Margaret E. Gosser, at the county aforesaid:

You are therefore commanded to send, without delay, to our judges composing the court of oyer and terminer of the said State the said indictment, with all things touching the same, as fully and as entirely as the said indictment now remains among the record of the said court of general sessions of the peace and jail delivery, at New Castle, in the county aforesaid.

Witness, Joseph P. Comegys, esquire, chief justice of the State of Delaware, and the seal of the said court of oyer and terminer, at New Castle, this thirteenth day of May, in the year of our Lord one thousand eight hundred and eighty.

12 By the court.

JOHN P. SPRINGER,
Clerk of the Court of Oyer and Terminer.

And thereupon, to wit, on the day and year aforesaid, and on the day of the return of the said writ, the said judges of the court of general sessions of the peace and jail delivery for said county to whom the writ, in form aforesaid, was so directed, make return thereof in the words following, to wit:

May term, 1880.

NEW CASTLE COUNTY, *ss:*

The grand inquest for the State of Delaware and the body of New Castle County, on their oath and affirmation, respectively, do present, that William Neal, late of Blackbird Hundred, in the county aforesaid, free negro, on the twenty-ninth day of March, in the year of our Lord one thousand eight hundred and eighty, with force and arms, at Blackbird Hundred, in the county aforesaid, in and upon one
13 Margaret E. Gosser, in the peace of God and the said State, then and there being, then *then* there violently and feloniously did make an assault and her, the said Margaret E. Gosser, then and there violently, forcibly, and against her will, feloniously did ravish and carnally know, against the form of the act of the general assembly in such case made and provided, and against the peace and dignity of the State.

GEORGE GRAY,
Attorney-General,
By ALEXANDER B. COOPER,
Deputy Att'y-Gen.

(Endorsement:) May term, 1880. 14. State vs. Wm. Neal. Indictment.

Witnesses: Margaret E. Gosser, s.; Dr. Collins; Thomas Deakyne, aff.; George C. Rothwell, s.; John Gosser, s.; George Maddiford, s.; Peter Warner, aff.; Wm. E. Baker, s.; Rachel Warner, aff.; James Saxton, s.; Wilhelmina Ash, John Brown, Enos Ash, s.; Joshua Guy, Phillip Clayton, s.; Jane Mathford.

14 STATE OF DELAWARE,
New Castle County, ss:

I hereby certify that the within and foregoing indictment is the original indictment mentioned in the writ of certiorari hereunto annexed.

In testimony whereof I have hereunto set my hand and affixed the seal of the said court of general sessions of the peace and jail delivery, at New Castle, the 13th day of May, A. D. one thousand eight hundred and eighty.

JOHN P. SPRINGER,
Clerk of the Peace.

The execution of this writ appears in the said indictment hereunto annexed.

Witness our hands and seals, this thirteenth day of May, A. D. 1880.

J. P. COMEGYS, *Ch. J.* [SEAL.]
JOHN W. HOUSTON, *J.* [SEAL.]
LEONARD E. WALES, *J.* [SEAL.]

And thereupon the said William Neal, being in the custody of John Pyle, esquire, the sheriff of New Castle County, was brought to
15 the bar of the court, and it appearing to the court that the said

William Neal was not able to retain counsel in his behalf, the court here do assign Anthony Higgins, esquire, as his counsel.

16 And afterwards, to wit, on the twentieth day of May, in the year aforesaid, the said William Neal, the prisoner at the bar, by his counsel, Anthony Higgins, comes and files in the court the following petition and affidavit in the words following, to wit:

In the court of oyer and terminer of the State of Delaware, sitting in and for New Castle County. May term, A. D. 1880.

THE STATE OF DELAWARE }
vs. }
WILLIAM NEAL. }

Indictment for rape, certified from the court of general sessions for said county.

To the honorable court of oyer and terminer of the State of Delaware, sitting in and for New Castle County.

The petition of William Neal respectfully represents that your
17 petitioner is the defendant in the above entitled indictment for the crime of rape alleged to have been committed on one Margaret E. Gosser; that said indictment was found in the court of general sessions of the peace and jail delivery for said county by the grand inquest of said [county*] on the eleventh day of May instant, and has since been duly certified into the court of oyer and terminer for said county.

That your petitioner is a citizen of the United States, and of the State of Delaware, of African race and descent, and black in color; that, by the statutes of the State of Delaware, all persons qualified to vote at the general election are liable to serve as jurors, except public officers of the said State or of the United States, counsellors and attornies at law, ordained ministers of the gospel, officers of colleges and teachers in public schools, practising physicians, surgeons regularly licensed, cashiers of incorporated banks, and all persons who are more
18 than seventy years of age.

That by the constitution of the State of Del., the right of an elector is enjoyed only by male citizens above the age of twenty-one years, who are also free white persons, and is not enjoyed by virtue of the provisions of the constitution of said State by persons otherwise qualified, who are not white persons.

That the levy court of New Castle County are required by the law of said State, at its annual session in March, to select from the list of taxable citizens of each county the names of one hundred sober and judicious persons to serve, if summoned, as grand jurors at the several courts to be holden in that year; and also the names of one hundred and fifty other sober and judicious persons to serve, if summoned, as petit jurors in said courts; that said levy court for said county, at their annual session in March last, in selecting persons to serve as
19 grand jurors and petit jurors as aforesaid, if summoned, for the courts aforesaid, including both the court of general [sessions*] and the court of oyer and terminer as aforesaid, selected no persons of color or African race to serve as such jurors as aforesaid, but, on the contrary thereof, did exclude all colored persons and persons of African

* In pencil in the original.—PRINTER.

race, because of their race and color, from those selected as aforesaid to serve as and be drawn for jurors as aforesaid; that the prothonotary and clerk of the peace for said county drew from the lists of those so selected as aforesaid to serve as grand jurors the grand jurors by the said indictment against your petitioner was found, and also drew from the list of those selected as aforesaid to serve as petit jurors the petit jurors by whom your petitioner is to be tried for his life under said indictment, and that from both the grand jury aforesaid and from
20 the said petit jury all persons otherwise qualified by law to serve as jurors as aforesaid who were persons of color and of African race were excluded as aforesaid, because of their race and color, from serving thereon as jurors, and that said grand and petit juries were drawn from and composed of exclusively white persons, and that, in fact, persons of color and of African race, though otherwise qualified, have always in said county and State been excluded from serving on juries because of their race and color; that by reason of the exclusion as aforesaid from said grand and petit juries in said courts of all persons of color and African race, because of their race and color, though otherwise qualified to serve as jurors, your petitioner, in the finding of said indictment, has been and in the trial thereof will be denied the equal protection of the laws;
21 and will not have the full and equal benefit of all laws and *and* proceedings in the State of Delaware for the security of his person in the trial of said indictment as is enjoyed by white persons.

That, by reason of the exclusion as aforesaid of all persons of color and African race from said grand and petit juries in said courts and by reason of the constitution and laws of Delaware in respect to the qualifications of jurors excluding from said grand and petit jury all colored persons of African race, your petitioner is denied and cannot enforce in the judicial tribunals of the State of Delaware a right secured to him by the law of the United States providing for the equal civil rights of citizens of the United States, to wit, the rights under the fourteenth article of the amendments to the Constitution of the United States to the equal protection of the laws; and to the right under said amend-
22 ment and the acts of Congress in the enforcement thereof to a trial under said indictment for his life by a jury from which the State of Delaware has not excluded all persons of his own race and color because of their race and color.

Your petitioner therefore prays this honorable court that the said indictment and its prosecution be removed into the circuit court of the United States for the district of Delaware for trial at the next ensuing term of said circuit court.

And your petitioner will ever pray.

his
WILLIAM + NEAL.
mark.

Sworn to and subscribed by the said William Neal, the thirteenth day of May, A. D. 1880, before me.

JOHN P. SPRINGER, *C. P.*

STATE OF DELAWARE,
New Castle County, ss:

23 On this fourteenth day of May, A. D. 1880, before me, John P. Springer, clerk of the peace and of the court of oyer and terminer and the court of general sessions of the peace and jail delivery for New Castle County, personally appeared William Neal, who, being by

me first solemnly sworn according to law, says that the facts set forth in the foregoing petition (signed by him by making his mark thereunto in my presence) are true to the best of his knowledge and belief.

his
WILLIAM + NEAL.
mark.

Sworn to and subscribed before me, as witness my hand and the seal of the court of oyer and terminer the day and year aforesaid.

JOHN P. SPRINGER, *C. P.*

24 (Endorsement:) Court of oyer & terminer. The State of Delaware vs. William Neal. Petition & affidavit. Please file this petition, &c. Anthony Higgins, att'y for defendant. To John P. Springer, C. P. Filed May 20th, 1880.

And now, to wit, this twenty-fourth day of May, A. D. eighteen hundred and eighty, the prisoner, William Neal, being brought to the bar by the sheriff, to whose custody in the jail of New Castle County aforesaid he had been committed in his proper person, is arraigned; and upon
25 his arraignment he pleads not guilty. Guilty, says the attorney-general; whereupon the prisoner, William Neal, is again remanded to the custody of the said sheriff.

And now, to wit, this twenty-fifth day of May, A. D. eighteen hundred and eighty, the prisoner, William Neal, being again brought to the bar, in his proper person, by the sheriff aforesaid, and forthwith being demanded concerning the premises in the said indictment above specified, how he will acquit himself thereof, for good or evil, he puts himself upon the country. And George Gray, esquire, who prosecutes for the State in this behalf, doth the like. Whereupon let a jury thereupon here immediately come before the said justices.

Whereupon, on the same day and year last aforesaid, here comes a jury to the bar, by the sheriff of the county aforesaid duly sum-
26 moned and empaneled, to wit, Thomas S. Dixon, John W. Worrell, John Williams, Hyland P. Bullen, Jesse Reeves, William Lawton, James Vanandalen, Aaron K. Paxson, John Thompson, Richard Booth, Deweese Chandler, and Joseph H. King, who being duly elected, tried, sworn, and affirmed to speak the truth of and concerning the premises, upon their oath and affirmation, respectively, do say that the prisoner, William Neal, is guilty in manner and form as he stands indicted. Whereupon the prisoner is remanded to the custody of the sheriff aforesaid.

And now, to wit, this twenty-seventh day of May, A. D. 1880, the prisoner, William Neal, being again brought to the bar in his proper person, by the said sheriff of the county aforesaid, to whose custody in the jail of New Castle County he had been committed, it is therefore considered by the court that you, William Neal, be now taken
27 from the bar of this court to the public prison of New Castle County, the place from whence you came; that you be there safely and securely kept in custody until Friday, the twenty-seventh day of August, A. D. eighteen hundred and eighty; that on that day, between the hours of ten o'clock in the morning and two o'clock in the afternoon, you be taken to some convenient place of private execution within the precincts of the prison inclosures, and that you be then and

there hanged by the neck until you be dead. And may God have mercy on your soul.

And you are now committed to the custody of the sheriff of New Castle County until this sentence of the court is carried into execution.

Present: John Pyle, sheriff.

28 And thereupon the said prisoner at the bar, by Anthony Higgins, esquire, his counsel as aforesaid, files in the court here the following bill of exceptions, duly signed and sealed, in the words and figures following, to wit:

29 *Bill of exceptions.*

In the court of oyer and terminer of the State of Delaware, sitting in and for New Castle County. May term, A. D. 1880.

THE STATE OF DELAWARE
vs.
WILLIAM NEIL.

Indictment for rape removed by certiorari from the court of general sessions and jail delivery of said State for said county.

Before the trial of the defendant, William Neil, upon the indictment by the grand inquest of the State of Delaware for the body of New Castle County of the crime of rape upon one Margaret E. Gosser, a white woman, and after the said indictment had been removed by certiorari into the said court of oyer and terminer from the court of general sessions of the peace and jail delivery of said State for said county, and before the said defendant was arraigned under said indictment, and before he pleaded thereto, to wit, on the twentieth day of May, A. D. 1880, the said defendant, by Anthony Higgins, his attorney and counsel by assignment of the said court, filed in the said court of oyer and terminer the petition of the said defendant, William Neal, signed and verified by the oath of the said defendant, praying that the said indictment and its prosecution might be removed into the circuit court of the United States for the district of Delaware for reasons in said petition
30 assigned, which said petition is in the words and figures following, to wit:

In the court of oyer and terminer of the State of Delaware, sitting in and for New Castle County. May term, A. D. 1880.

THE STATE OF DELAWARE
vs.
WILLIAM NEIL.

Indictment for rape, certified from the court of general sessions for said county.

To the honorable court of oyer and terminer of the State of Delaware, sitting in and for New Castle County:

The petition of William Neil respectfully represents that your petitioner is the defendant in the above entitled indictment for the crime of rape, alleged to have been committed on one Margaret E. Gosser; that said indictment was found in the court of general sessions of the peace

and jail delivery for said county by the grand inquest of said county, on the eleventh day of May, instant, and has since been duly certified into the court of oyer and terminer for said county.

That your petitioner is a citizen of the United States, and of the State of Delaware, of African race and descent and black in color; that by the statutes of the State of Delaware all persons qualified to vote at the general election are liable to serve as jurors, except public officers of the said State or of the United States, counsellors and attorneys at
31 law, ordained ministers of the gospel, officers of colleges and teachers in public schools, practising physicians and surgeons regularly licensed, cashiers of incorporated banks, and all persons who are more than seventy years of age.

That by the constitution of the State of Delaware the right of an elector is enjoyed only by male citizens above the age of twenty-one years, who are also free white persons, and is not enjoyed by virtue of the provisions of the constitution of said State by persons otherwise qualified who are not white persons.

That the levy court of New Castle County are required by the law of said State, at its annual sessions in March, to select from the list of taxable citizens of such county the names of one hundred sober and judicious persons to serve, if summoned, as grand jurors at the several courts to be holden in that year, and also the names of one hundred and fifty other sober and judicious persons to serve, if summoned, as petit jurors in said courts.

That said levy court for said county at their annual sessions in March last, in selecting persons to serve as grand jurors and petit jurors as aforesaid, if summoned for the courts aforesaid, including both the court of general sessions and the court of oyer and terminer as aforesaid, selected no persons of color or African race to serve as such jurors as aforesaid, but on the contrary thereof did exclude all colored persons
32 and persons of African race, because of their race and color, from those selected as aforesaid to serve as and be drawn for jurors as aforesaid.

That the prothonotary and clerk of the peace for said county, drew from the lists of those so selected aforesaid to serve as grand jurors, the grand jurors by whom the said indictments against your petitioner was found, and also drew from the list of those selected as aforesaid to serve as petit jurors the petit jurors by whom your petitioner is to be tried for his life under said indictment, and that from both the grand jury aforesaid and from the said petit jury, all persons qualified by law to serve as jurors as aforesaid, who were persons of color and of African race, were excluded as aforesaid, because of their race and color, from serving thereon as jurors, and that said grand and petit juries were drawn from and are composed of exclusively white persons, and that in fact persons of color and of African race, though otherwise qualified, have always in said county and State been excluded from serving on juries because of their race and color.

That by reason of the exclusion as aforesaid from said grand and petit juries in said courts of all persons of color and African race, because of their race and color, though otherwise qualified to serve as jurors, your petitioner in the finding of said indictment has been,
33 and in the trial thereof will be denied the equal protection of the laws, and will not have the full and equal benefit of all laws and proceedings in the State of Delaware for the security of his person in the trial of said indictment as is enjoyed by white persons.

That by reason of the exclusion as aforesaid of all persons of color

and African race from said grand and petit juries in said courts, and by reason of the constitution and laws of Delaware in respect to the qualifications of jurors, excluding from said grand and petit juries all colored persons of African race, your petitioner is denied, and cannot enforce, in the judicial tribunals of the State of Delaware, a right secured to him by the law of the United States providing for the equal rights of citizens of the United States, to wit, the right under the fourteenth article of the amendments to the Constitution of the United States, to the equal protection of the law; and to the right, under said amendment and the acts of Congress, in the enforcement thereof, to a trial under said indictment for his life by a jury from which the State of Delaware has not excluded all persons of his own race and color, because of their race and color.

Your petitioner therefore prays this honorable court that the said indictment and its prosecution be removed into the circuit court of the United States for the district of Delaware, for trial at the next ensuing term of said circuit court:

34 And your petitioner will ever pray.

his
WILLIAM + NEIL.
mark.

Sworn and subscribed by the said William Neil the thirteenth day of May, A. D. 1880, before me.

JNO. P. SPRINGER, *C. P.*

STATE OF DELAWARE,
New Castle County, ss:

On the fourteenth day of May, A. D. 1880, before me, John P. Springer, clerk of the peace and of the court of oyer and terminer and the court of general sessions of the peace and jail delivery for New Castle County, personally appeared William Neil, who, being by me first solemnly sworn according to law, says that the facts set forth in the foregoing petition (signed by him by making his mark thereunto in my presence) are true to the best of my knowledge and belief.

his
WILLIAM + NEIL.
mark.

Sworn and subscribed before me as witness. Witness my hand and the seal of the court of oyer and terminer the day and year aforesaid.

JNO. P. SPRINGER, *C. P.*

[SEAL OF THE COURT OF OYER AND TERMINER, NEW CASTLE COUNTY.]

But the court, being of the opinion that the said defendant was not entitled to have his case removed to the circuit court of the United States, because there is no law of the State of Delaware forbidding the levy court to select persons of African race and of color as jurors,

35 because of their race and color, if in the judgment of the levy court such persons are otherwise qualified to serve as jurors;

And because it did not appear to the said court that the said grand jury and the said petit jury, though composed solely of white men, were so made up because the names of colored men were not selected for jury service on the ground of their race and color;

And because the said defendant had not shown he was denied any right secured to him as a citizen of the United States, through the selection of those panels by the levy court, denied the prayer of the

petitioner, the said defendant, and refused to certify the said indictment and prosecution into the circuit court of the United States for the district of Delaware, and compelled the said defendant to proceed to trial in the said court of oyer and terminer of the State of Delaware, sitting in and for New Castle County.

To which ruling of the court denying the prayer of the said petitioner for the removal of the said indictment and prosecution to the circuit court of the United States for the district of Delaware, and compelling him to proceed to trial in the court of oyer and terminer of the State of Delaware, sitting in and for New Castle County, the defendant excepted, and prayed the court to seal this his bill of exceptions, which is done accordingly.

36 And thereupon, and before the trial of the defendant, William Neal, upon said indictment, and before said defendant was arraigned under said indictment, and before he pleaded thereto, to wit, on the fourteenth day of May, A. D. 1880, the said defendant, by Anthony Higgins, his counsel, moved to quash the said indictment, and also to quash the list and panel of grand jurors by whom said indictment was found, which are in the words and figures following, to wit:

Panel of grand jurors for the court of general sessions of the peace and jail delivery, and court of oyer and terminer, in and for New Castle County, at the May term, A. D. 1880.

1. William Wilson, Brandywine Hundred.
2. William Baxter, Wilmington Hundred.
3. John R. Tatum, Christiana Hundred.
4. Edward Haman, Mill Creek Hundred.
5. Jonathan Groves, White Clay Creek Hundred.
6. Joseph J. Taggart, New Castle Hundred.
7. Joseph W. Cooch, Pencader Hundred.
8. Anthony Reybold, Red Lion Hundred.
9. William Wood, St. George's Hundred.
10. James R. Collins, Appoquinimink Hundred.
11. George D. Collins, Blackbird Hundred.
12. Samuel H. Derrick, Brandywine Hundred.
13. Milton Lackey, Wilmington Hundred.
14. John S. Miller, Christiana Hundred.

37 15. Jacob Rubencame, Mill Creek Hundred.

16. Charles C. King, White Clay Creek Hundred.
17. William F. Thompson, New Castle Hundred.
18. Adam Dayett, Pencader Hundred.
19. George F. Brady, Red Lion Hundred.
20. Columbus Watkins, St. George's Hundred.
21. Stringer L. Tinley, Appoquinimink Hundred.
22. Thomas Middleton, Blackbird Hundred.
23. Henry Eckel, Wilmington Hundred.
24. Alexander H. Davidson, New Castle Hundred.

Sheriff returns: Summoned. So ans.

JOHN PYLE, *Sheriff.*

And also to quash the lists and panels of petit jurors, summoned to attend said court for the trial of said indictment, which said lists and panels are in the words and figures following, to wit:

Panel of petit jurors summoned to attend the court of general sessions of the peace and jail delivery and court of oyer and terminer for New Castle County, at the May term, A. D. 1880.

FIRST PANEL.

1. William H. Bird, Brandywine Hundred.
2. Edward McCall, Wilmington Hundred.
3. James H. Carpenter, Christiana Hundred.
4. Joseph Barker, Mill Creek Hundred.
5. Henry Rummer, White Clay Creek Hundred.
6. Thomas Lindell, Pencader Hundred.
38 7. Daniel B. McGovern, New Castle Hundred.
8. Sewell B. Scott, Red Lion Hundred.
9. Cyrus Polk, St. George's Hundred.
10. Abraham M. Whitlock, Appoquinimink Hundred.
11. John T. Cooper, Blackbird Hundred.
12. Jacob H. Hanby, Brandywine Hundred.
13. William H. Morris, Wilmington Hundred.
14. Hugh Foster, Christiana Hundred.
15. Maris T. Dixon, Mill Creek Hundred.
16. Nimrod Worrell, White Clay Creek Hundred.
17. John B. Le Fevre, Pencader Hundred.
18. William White, New Castle Hundred.
19. Edwin H. Peckard, Red Lion Hundred.
20. Henry A. Nowland, St. George's Hundred.
21. Richard Townsend, Appoquinimink Hundred.
22. Benjamin Money, Blackbird Hundred.
23. Amor G. Forwood, Brandywine Hundred.
24. James McClelland, Wilmington Hundred.
25. Samuel T. Garrett, Christiana Hundred.
26. Lewis Derrickson, Mill Creek Hundred.
27. Samuel Deputy, White Clay Creek Hundred.
28. Daniel Slack, Pencader Hundred.
29. Charles V. Wise, New Castle Hundred.
30. David Steelman, Red Lion Hundred.

Sheriff returns: Non est as to James McClelland & summoned the rest. So ans.

JOHN PYLE, *Sheriff.*

39 SECOND PANEL.

1. John Dugan, Brandywine Hundred.
2. Jacob Stuck, Wilmington Hundred.
3. Penrose Lynam, Christiana Hundred.
4. John W. Worrell, Mill Creek Hundred.
5. Theodore Ruth, White Clay Creek Hundred.
6. Edwin Clendennin, Pencader Hundred.
7. Jesse Reeves, New Castle Hundred.
8. Joseph Heisel, Red Lion Hundred.
9. John Zacheus, St. Georges Hundred.
10. Alexander Martin, Appoquinimink Hundred.
11. Patrick Hanafee, Blackbird Hundred.
12. William F. Wilson, Brandywine Hundred.
13. Lawrence Glatts, Wilmington Hundred.
14. George D. Cloud, Christiana Hundred.
15. John Thompson, Mill Creek Hundred.
16. John Rambo, White Clay Creek Hundred.
17. Alexander Crawford, Pencader Hundred.

18. Andrew J. Brown, jr., New Castle Hundred.
19. Edward R. Wright, Red Lion Hundred.
20. E. F. Boulden, St. Georges Hundred.
21. Purnell S. Daniels, Appoquinimink Hundred.
22. Auley Hill, Blackbird Hundred.
23. Thomas L. Talley, jr., Brandywine Hundred.
24. Richard Booth, Wilmington Hundred.
25. Pierson Talley, Christiana Hundred.
26. Thomas Ector, Mill Creek Hundred.
27. Hyland P. Bullon, White Clay Creek Hundred.
28. Aaron H. Paxson, Pencader Hundred.
49 29. James Van Arsdalen, New Castle Hundred.
30. Charles H. McWhorter, Red Lion Hundred.

Sheriff returns: Non est as to Edward R. Wright & summoned the rest. So ans.

JOHN PYLE, *Sheriff.*

Additional jurors summoned to attend the court of over and terminer, at the May term, A. D. 1880.

1. Thomas S. Dixon, Brandywine Hundred.
2. William Lawton, Wilmington Hundred.
3. William Rowe, Christiana Hundred.
4. Edward Gregg, Mill Creek Hundred.
5. James P. Morrison, White Clay Creek Hundred.
6. Jesse Boulden, Pencader Hundred.
7. James T. Eliason, New Castle Hundred.
8. Charles Crumptor, Red Lion Hundred,
9. Thomas Delworth, St. Georges Hundred.
10. Thomas Lamb, Appoquinimink Hundred.
11. James Thornton, Blackbird Hundred.
12. John S. Beeson, Brandywine Hundred.
13. John Williams, Wilmington Hundred.
14. John B. Gooding, Christiana Hundred.
15. George M. D. Robinson, Mill Creek Hundred.
16. Edward R. Wilson, White Clay Creek Hundred.
17. William W. Frazer, Pencader Hundred.
18. William A. Kimmey, New Castle Hundred.

Sheriff returns: Summoned. So ans.

JOHN PYLE, *Sheriff.*

41 Because the levy court for said county at their annual session in March last, in selecting persons to serve as grand jurors and petit jurors as aforesaid (if summoned), for the courts aforesaid, including both the court of general sessions and the court of oyer and terminer as aforesaid, selected no persons of color or African race to serve as such jurors as aforesaid, but on the contrary thereof did exclude all colored, persons and persons of African race, because of their race and color, from those selected as aforesaid to serve as and be drawn for jurors as aforesaid;

That the prothonotary and clerk of the peace for said county drew from the lists of those so selected as aforesaid to serve as grand jurors the grand jurors by whom the said indictment against the said defendant was found, and also drew from the list of those selected as aforesaid to serve as petit jurors the petit jurors by whom the said defendant was to be tried for his life under said indictment, and that from both

the grand jury aforesaid and from the said petit jury all persons qualified by law to serve as jurors as aforesaid who were persons of color and of African race were excluded as aforesaid because of their race and color, from serving thereon as jurors, and that said grand and petit jurors were drawn from and were composed of exclusively white
42 persons, and that, in fact, persons of color and of African race, though otherwise qualified, have always in said county and State been excluded from serving upon juries because of their race and color;

And that by reason of the exclusion as aforesaid from said grand and petit jurors in said courts of all persons of color and African race, because of their race and color, though otherwise qualified to serve as jurors, the said defendant in the finding of said indictment had been, and in the trial thereof would be, denied the equal protection of the laws, and would not have the full and equal benefit of all laws and proceedings in the State of Delaware for the security of his person as is enjoyed by white persons.

It being then and there agreed by and between George Gray, esquire, attorney-general of said State, on behalf of the said State, and the said defendant, through his said counsel, with the consent of the court then had, that the statements and allegations of the defendant in his aforesaid petition for the removal of said indictment, and its prosecution for trial into the said circuit court of the United States, and their verification by the oath of the defendant, should be taken and treated and given the same force and effect, in the consideration and decision of the said motions to quash said indictment, and said lists and panels of grand jurors and petit jurors, as if said statements and allegations were
43 made and verified by the defendant in a separate and distinct affidavit.

And the said court thereupon did overrule and refuse to grant the said motion of the said defendant to quash the said indictment, and to quash the said lists and panels of grand jurors and petit jurors, because although in fact no persons of African race and of color were upon the said panels of either grand jurors or petit jurors, yet no evidence had been produced or offered by the said defendant to prove his statements and allegations to his said petition and affidavit thereto, upon which said motion to quash was founded, that the exclusion by the said levy court from said grand and petit juries of all persons of African race and color was because of their race and color, and that the court could not accept such fact of exclusion because of race and color to be established by the circumstance that no persons of African race or of color were, in fact, on said lists and panels of grand jurors and petit jurors, or by the mere unaided affidavit of the defendant, but the same should have been proven affirmatively on the part of said defendant, and by competent testimony outside of his own affidavit, before said motion to quash could be granted; to which ruling of the court, refusing to quash said indictments and said lists and panels of grand jurors and petit jurors, the defendant excepted, and prayed that his exceptions might be sealed
44 and made a part of the record, which is accordingly done.

And thereupon, and before the trial of the said defendant upon said indictment, and before the said defendant was arraigned under said indictment, and before he had pleaded thereto, and after the said motion of the defendant to quash the said indictment and the said lists and panels of grand jurors and petit jurors, because of the alleged exclusion by the levy court of New Castle County from said lists and panels of grand jurors and petit jurors of all persons of African race and color, because of their race and color, had been overruled by the court, be-

cause the said defendant had offered no evidence or witnesses to prove the statements and allegations of his own affidavit that the said levy court had excluded from said lists and panels of grand jurors and petit jurors all persons of African race and of color, because of their race and color, to wit, on the twenty-fourth day of May, A. D. 1880, the said defendant, by his said counsel, did further move the court to permit him to produce as witnesses in support of said motion to quash said indictment, and said lists and panels of grand jurors and petit jurors, and in support of the allegations and statements of the petition and affidavit of the said defendant, on which said motion was founded, the commissioners and clerk and bailiff of said levy court, and that
45 the court should issue, by its clerk, subpœnas for the said persons as witnesses to testify as aforesaid.

And the said State by George Gray, esquire, the attorney-general, objected to the granting of said motion, but the court overruled the said motion and refused to cause subpœnas to be issued for said witnesses and to permit the said defendant to produce the same or to go into the proof of said statements and allegations of his said petition and affidavit on which the said motion to quash said indictment and said lists and panels of grand jurors and petit jurors was founded, that the said levy court had excluded from said lists and panels of grand jurors and petit jurors all persons of African race and color, because of their race and color, on the ground that full time to produce such witnesses to make such proof had existed before the motions were heard; that application for leave to summon witnesses to support a motion which had been argued and refused because of want of proof when sufficient time had existed for its production was without precedent in the court of oyer and terminer of this State, and therefore in this case the motion must be treated as coming too late to be granted, to which ruling of the court the defendant excepted, and prayed that the exception
46 might be sealed and made a part of the record, which is accordingly done.

JOSEPH P. COMEGYS, [SEAL.]
Chief Justice of the State of Delaware.

47 STATE OF DELAWARE,
New Castle County, ss:

I, Edwin R. Cochran, clerk of the peace of the State of Delaware, in and for New Castle County, and as such clerk of the court of oyer and terminer of said State for said county, do hereby certify that the foregoing pages contain a true copy of the whole record and proceedings in the aforesaid stated case as the same remains of record in the said court of oyer and terminer at New Castle.

In testimony whereof I have hereunto set my hand and affixed the seal of the said court of oyer and terminer at New Castle, the eighteenth day of August, A. D. eighteen hundred and eighty.

[SEAL.] E. R. COCHRAN,
Clerk of the Peace.

48 In the court of general sessions of the peace and jail delivery of the State of Delaware, in and for New Castle County.

At a court of general sessions of the peace and jail delivery of the State of Delaware, begun and held at New Castle, in and for New Castle County, on the tenth day of May, in the year of our Lord one thousand eight hundred and eighty. Among the records and proceedings of which is the following:

Indictment for rape. True bill.

THE STATE OF DELAWARE
vs.
WILLIAM NEAL. } No. 14.

Be it remembered, that heretofore, to wit, on the tenth day of May, in the year of our Lord one thousand eight hundred and eighty, at the said court of general sessions of the peace and jail delivery, twenty-four grand jurors having been duly summoned and returned, out of which number a grand jury, to wit:

1. William Wilson.
2. William Baxter.
3. John R. Tatum.
4. Edward Haman.
5. Jonathan Groves.
6. Joseph I. Taggart.
7. Joseph W. Cooch.
8. Anthony Reybold.
9. William Wood.
10. James R. Collins.
11. Samuel H. Derrick.
12. Milton Lackey.
13. John S. Miller.
14. Jacob Rubencame.
15. Charles C. King.
16. Wm. F. Thompson.
17. Adam Dayett.
18. George F. Brady.
19. Columbus Watkins.
20. Stringer L. Tinley.
21. Thomas Middleton.
22. Henry Eckle.
23. Alexander H. Davidson.

Of whom one, to wit, Henry Eckle, was by the the court here appointed the foreman thereof, and the said foreman and grand jurors aforesaid then and there did appear at the bar, and being duly
50 sworn or affirmed to the faithful discharge of their duty and trust, did depart therefrom.

And that afterward, to wit, on the eleventh day of May, in the year aforesaid, the said grand jurors aforesaid did appear at the bar, and did by their said foreman bring here to the court a certain paper-writing, commonly called an indictment, in the words and figures following, to wit:

May term, 1880.

NEW CASTLE COUNTY, *ss:*

The grand inquest for the State of Delaware and the body of New-castle County, on their oaths and affirmation, respectively do present that William Neal, late of Blackbird Hundred, in the county aforesaid, free negro, on the twenty-ninth day of March, in the year of our Lord one thousand eight hundred and eighty, with force and arms, at Blackbird Hundred, in the county aforesaid, in and upon one Margaret
51 E. Gosser, in the peace of God and the said State, then and there, being then and there, violently and feloniously did make an assault, and her, the said Margaret E. Gosser, then and there violently, forcibly, and against her will, feloniously did ravish and carnally know *know*, against the form of the act of the general assembly in such case made and provided, and against the peace and dignity of the State.

GEORGE GRAY,
Attorney General,
By ALEXANDER B. COOPER,
Deputy Attorney-General.

(Indorsed:) May term, 1880. State vs. William Neal. Indictment. Rape.

Witnesses: Margaret E. Gosser, s.; Thomas Deakyne, aff.;
52 John Gosser, s.; Peter Warner, aff.; Rachel Warner, aff.; Wilhelmina Ash; Enos Ash, s.; Philip Clayton, s.; Dr. Collins; George C.

Rothwell, s.; George Maddiford, s.; William E. Baker, s.; James Saxton, s.; John Brown, Joshua Guy, Jane Mattiford.

True bill.

HENRY ECKLE,
Foreman.

STATE OF DELAWARE,
New Castle County, ss:

I hereby certify that the within and foregoing indictment is the original indictment mentioned in the writ of certiorari hereunto annexed.

In testimony whereof I have hereunto set my hand and affixed the seal of said court of general sessions of the peace and jail delivery,
53 at New Castle, the 13th day of May, one thousand eight hundred and eighty.

[SEAL.] JOHN P. SPRINGER,
Clerk of the Peace.

The execution of this writ appears on the said indictment hereunto annexed.

Witness our hands and seals this thirteenth day of May, in the year aforesaid.

J. P. COMEGYS, *Ch. J.* [SEAL]
JOHN W. HOUSTON, *J.* [SEAL.]
LEONARD E. WATER, *J.* [SEAL.]

STATE OF DELAWARE,
New Castle County, ss:

I, Edwin R. Cochran, clerk of the peace of the State of Delaware in and for New Castle County, and as such clerk of the court of general sessions of the peace and jail delivery of said State for said county, do hereby certify that the foregoing pages contain a true copy of the whole record and proceedings in the aforesaid-stated case as the same now remains of record in the said court of general sessions of the peace and jail delivery at Newcastle.

54 In testimony whereof I have hereunto set my hand and affixed the seal of the said court of general sessions of the peace and jail delivery, at New Castle, the eighteenth day of August, A. D. eighteen hundred and eighty.

[SEAL.] E. R. COCHRAN,
Clerk of the Peace.

55 *Assignment of errors.*

In the Supreme Court of the United States.

Writ of error to the court of oyer and terminer of the State of Delaware, sitting in and for New Castle County.

WILLIAM NEAL
vs.
THE STATE OF DELAWARE.

And thereupon, the plaintiff in error above named, the said William Neal, by Anthony Higgins, his attorney, comes into court here, and says that in the record and proceedings aforesaid, and also in the giving of the judgment in the plea aforesaid, there is manifest error in this, to wit:

1. That the said court erred in denying the prayer of the petition of the said defendant, William Neal, to remove the said indictment and its prosecution into the circuit court of the United States for the district of Delaware, for trial at the next ensuing term thereof; and in refusing to certify the said indictment and prosecution into said circuit court.

56 2. That the said court erred in compelling the said defendant, William Neal, after the filing of said petition to remove said indictment and its prosecution into the United States circuit for district of Delaware, to proceed to the trial of said indictment in said court of oyer and terminer, and in taking any further proceedings under said indictment.

3. That the court erred in deciding that there is no law of the State of Delaware forbidding the levy court of New Castle County to select persons of African race and of color as jurors, because of their race and color, if in the judgment of the levy court such persons are otherwise qualified to serve as jurors, and upon that ground in denying the prayer of the said petition of the said defendant, William Neal, and refusing to remove the said indictment and prosecution into the said circuit court of the United States for the district of Delaware, and in compelling the said William Neal to proceed to trial on said indictment before the court of oyer and terminer, and in taking any further proceedings under said indictment.

57 4. That the court erred in deciding that it did not appear to the said court that the said grand jury and the said petit jury, though composed solely of white men, were so made up because the names of colored men were not selected for jury service on the ground of their race or color; and in denying for that reason, and upon that ground, the prayer of the said petition of the said defendant, William Neal; and refusing to remove said indictment and prosecution into said circuit court, and in compelling the said defendant, William Neal, to proceed to trial on said indictment by said court of oyer and terminer.

5. That the court erred in deciding that the said defendant, William Neal, had not shown he was denied any right secured to him as a citizen of the United States through the selection of the said panels of grand jurors and petit jurors by the said levy court of New Castle County, and for that reason, and upon that ground, in denying the prayer of the said petition of the said defendant and refusing to remove said in-

58 dictment and prosecution into the circuit court of the United States for the district of Delaware, and in compelling the said defendant to proceed to trial on said indictment before the said court of oyer and terminer, and in taking any further proceedings under said indictment in said court.

6. That the court erred in overruling and refusing to grant the motion of the said defendant, William Neal, to quash the said indictment, and to quash the said lists and panels of grand jurors and petit jurors.

7. That the court erred in deciding that, no evidence having been produced or offered by the said defendant, Wiliam Neal, to prove his statements and allegations in his said petition, upon which said motion to quash the said indictment and the said lists and panels of grand jurors and petit jurors was founded, to wit, that the exclusion by the said levy court from said grand and petit jurors of all persons of African race and of color was because of their race and color, the court

59 could not accept such fact of exclusion because of race and color to be estabilised by the circumstance that no persons of African race or of color were in fact on said lists and panels of grand jurors and petit jurors, and in overruling and refusing for that reason and upon that to grant the motion of the said defendant, William Neal, to quash said indictment and said lists and panels of grand jurors and petit jurors.

8. That the court erred in deciding that, although the levy court of New Castle County, at their annual session in March, A. D. 1880, in selecting persons to serve as grand jurors and petit jurors for the court

of general sessions of the peace and jail delivery of said State for New Castle County, and for the court of oyer and terminer of said State for said county, selected no persons of African race or of color to serve on and be drawn as jurors as aforesaid in said courts; and that, although the prothonotary and clerk of the peace of said county drew
60 from the lists of those so selected to serve as grand jurors the grand jurors by whom the said indictment against the said defendant was found, and also drew from the lists of these so selected as aforesaid to serve as petit jurors the petit jurors by whom the said defendant was tried for his life under said indictment; and that, although said grand jurors and petit jurors were drawn from and were exclusively composed of white persons; and that, although in fact persons of color and African race, though otherwise qualified, had always in said county and State been excluded from serving upon juries, yet that the exclusion by the said levy court of all persons of African race and color from said grand and petit juries was not shown to have been because of their race and color, and in overruling and refusing, for that reason and upon that ground, to grant the motion of the said defendant, William Neal, to quash said indictment and said lists and panels of grand jurors and petit jurors.

61 9. That the said court erred in refusing, after the said court had refused to quash said indictment and said lists and panels of gand jurors and petit jurors, and before the said defendant had pleaded to said indictment, in further refusing to grant, and in overruling the motion of the said defendant, William Neal, to permit him to produce as witnesses in support of said motion to quash said indictment and said lists of grand jurors and petit jurors, and in support of the allegations and statements of said petition and affidavit of the said defendant, upon which said motion to quash was founded, the commissioners and clerk and bailiff of said levy court, and, through its clerk, to issue subpœnas for the said persons as witnesses to testify as aforesaid, and to permit the said defendant to go into proof of the statements and allegations of said petition and affidavit, that the said levy court had excluded from said lists and panels of grand and petit jurors all persons of African race and of color because of their race and color.

62 10. That the said court erred in deciding that the application and motion of the defendant, William Neal, for leave to summon witnesses to make proof in support of his motion to quash said indictment and said panels of grand jurors and petit jurors because of the exclusion from said panels of jurors of all persons of African race and color because of their race and color, after said motion had been argued and refused because of want of proof, when sufficient time had existed for its production, must be treated as coming too late, and in overruling, for that reason, the said application and motion to summon witnesses to make proof in support of his said motion to quash.

11. That the court erred in entering judgment against the said defendant upon said indictment, under the facts and circumstances set forth in the bill of exceptions, and therefore the said William Neal, the defendant and plaintiff in error, prays this honorable court that the proceedings and judgment aforesaid be reversed.

ANTHONY HIGGINS,
Counsel for William Neal, Plaintiff in Error.

(Indorsement on cover:) No. 865. William Neal, plaintiff in error, vs. The State of Delaware. Delaware court of oyer & terminer of New Castle County. Filed 21st September, 1880.

SUPREME COURT U.S.
FILED
MAR 23 1881

THE STATE OF DELAWARE

vs.

WILLIAM NEAL.

Opinions of Court of Oyer and Terminer. Chief Justice Comegys. Associate Judges Houston and Wales.

MAY TERM, 1880.
New Castle County, Delaware.

WASHINGTON, D. C.
THE GLOBE PRINTING AND PUBLISHING HOUSE.
1881.

THE STATE OF DELAWARE

vs.

WILLIAM NEAL.

Opinions of Court of Oyer and Terminer. Chief Justice Comegys. Associate Judges Houston and Wales.

MAY TERM, 1880.
New Castle County, Delaware.

WASHINGTON, D. C.
THE GLOBE PRINTING AND PUBLISHING HOUSE.
1881.

Following is the full text of the opinion of the Court, delivered on Monday morning last, denying the application of prisoner's counsel, Anthony Higgins, Esq., for the removal of the Neal case to the United States Circuit Court for trial, as also the motion for quashing the indictment on the allegation that colored men had been intentionally excluded from the jury panel.

WHAT THE CHIEF JUSTICE SAID.

Chief Justice Comegys read the following opinion:

THE STATE
vs.
WILLIAM NEAL. } New Castle, May term, 1880.

INDICTMENT FOR RAPE

Motion to remove the case to the United States court; also to quash the indictment, and the grand and petit jury panels.

The prisoner, William Neal, was indicted at the present term of the Court of General Sessions of the Peace and Jail Delivery for the crime of rape, alleged to have been committed by him, on the 29th day of March last, upon Margaret E. Gosser. The indictment was removed by *certiorari* into this court for trial; and the prisoner, being poor, the Court assigned him as his counsel to defend him, Anthony Higgins, Esq., who presented to us last week the following petition, supported by the prisoner's affidavit:

IN THE COURT OF OYER AND TERMINER OF THE STATE OF DELAWARE, SITTING IN AND FOR NEW CASTLE COUNTY.

MAY TERM, A. D. 1880.

THE STATE OF DELAWARE *vs.* WILLIAM NEAL. } Indictment for rape, certified from the Court of General Sessions for said county.

To the Honorable Court of Oyer and Terminer of the State of Delaware, sitting in and for New Castle County:

The petition of William Neal respectfully represents: That your petitioner is the defendant in the above-entitled indictment for the crime of rape, alleged to have been committed on one Margaret E. Gosser; that said indictment was found in the Court of General Sessions of the Peace and Jail Delivery for said county by the grand inquest of said county, on the 11th day of May, instant, and has since been duly certified into the Court of Oyer and Terminer for the said county.

That your petitioner is a citizen of the United States and of the State of Delaware, of African race and descent, and black in color; that by the statutes of the State of Delaware all persons qualified to vote at the general election are liable to serve as jurors, except public officers of the said States of the United States, counselors and attorneys-at-law, ordained ministers of the gospel, officers of colleges and teachers in public schools, practicing physicians and surgeons regularly licensed, cashiers of incorporated banks, and all persons who are now more than seventy years of age; that by the constitution of the State of Delaware the right of an elector is enjoyed only by male citizens above the age of twenty-one years, who are also free white persons, and is not enjoyed by virtue of the provisions of the constitution of said State by persons otherwise qualified who are not white persons; that the Levy Court is required by the law of said State at its annual session in March to select from the list of taxable citizens of each county the names of 100 sober and judicious persons to serve (if summoned) as grand jurors at the several courts to be holden in that year, and also the names of 150 other sober and judicious persons to serve (if summoned) as

petit jurors in said courts; that said Levy Court for said county, at their annual session in March last, in selecting persons to serve as grand jurors and petit jurors, as aforesaid, (if summoned,) for the courts aforesaid, including both the Court of General Sessions and the Court of Oyer and Terminer, as aforesaid, selected no persons of color or African race to serve as such jurors, as aforesaid, but on the contrary thereto, did exclude all colored persons and persons of African race, because of their race and color, from those selected as aforesaid, to serve as and be drawn for jurors, as aforesaid; that the Prothonotary and Clerk of the Peace for said county drew from the lists of those selected as aforesaid, to serve as grand jurors, the grand jurors by whom the said indictment against your petitioner was found, and also drew from the lists of those selected as aforesaid, to serve as petit jurors, the petit jurors by whom your petitioner is to be tried for his life under said indictment, and that from both the grand jury aforesaid and from the said petit jury all persons qualified by law to serve as jurors as aforesaid, who were persons of color and of African race, were excluded as aforesaid because of their race and color from serving thereon as jurors, and that said grand and petit jurors were drawn from and are composed of exclusively white persons, and that in fact persons of color and of African race, though otherwise qualified, have always, in said county and State, been excluded from serving on juries because of their race and color: that by reason of the exclusion as aforesaid from said grand and petit jurors in said courts of all persons of color and African race because of their race and color, though otherwise qualified to serve as jurors, your petitioner, in the finding of said indictment, has been, and in the trial thereof will be, denied the equal protection of the laws, and will not have the full and equal benefit of all laws and proceedings in the State of Delaware for the security of his person as is enjoyed by white persons: that by reason of the exclusion as aforesaid of all persons of color and African race from said grand and petit juries in said county, and by reason of the Constitution and laws of Delaware, in respect to the qualification of jurors, excluding from said grand and petit juries all colored persons of African race, your petitioner is denied, and cannot enforce in the judicial tribunals of the State of Delaware a right secured to him by the law of the United States providing for the equal civil rights of citizens of the United States, to wit:

the right under the Fourteenth Article of the amendments to the Constitution of the United States, to the equal protection of the laws, and to the right under said amendment and the acts of Congress in the enforcement thereof to a trial under said indictment for his life by a jury, from which the State of Delaware has not excluded all persons of his own race and color because of their race and color.

Your petitioner therefore prays this Honorable Court that the said indictment and its prosecution be removed into the Circuit Court of the United States for the district of Delaware for trial at the next ensuing term of said Circuit Court. And your petitioner will ever pray.

his
WILLIAM ✕ NEAL.
mark.

Sworn and subscribed to on May 13, before John P. Springer, Clerk of the Peace.

Upon consultation between him and George Gray, Esq., the Attorney-General, it was agreed that a motion to quash the grand jury panel and the indictment found by that body, and also the petit jury panel in attendance upon this court, for the trial of such indictment might be considered along with the motion to remove; and the argument was made of the two questions accordingly.

Before proceeding to consider the subject itself presented to the court, and the points of argument presented by both sides, it may be allowed that notice be taken of the conduct of the learned counsel in arguing the question before us. We have rarely seen a case where the respect counsel should feel for themselves and their profession, and the fidelity to court and client (which those who appreciate the important relation they bear to the administration of justice should ever have in view) have been more carefully observed. The discussion was unimpassioned, very able, and free from any expression showing prepossession of opinion or prejudice of mind. Throughout it was characterized by a worthy purpose of the prisoner's counsel to secure him every right, or privilege to which he was entitled, and a like commendable

object on the part of the Attorney-General to protect the State against the degradation, as he conceived, to which she would be subjected, under the circumstances, if the prisoner's application should be granted. We are prepared always to see high and distinguished members of our bar rise above all considerations, except those of pure duty, in a cause; but there are occasions when the impulse of passion and the heat of discussion (especially in cases like the present) betray the most composed and well-governed into expressions or tokens of ill-feeling. There was nothing apparent here, however, that evinced aught but a faithful, candid, frank purpose to present the questions made, or argued upon the petition, so as to inform the mind of the court, and enable it to make a right decision.

The order of discussion of the questions submitted to the Court, was, first, the question of removal; and second, that of quashing the juries and indictment. We propose to treat them inversely.

The motion to quash is made upon the ground that colored men, that is men of the African race, were excluded from the juries by the Levy Court, whose duty it is, under our statute, to select the grand and petit jurors for the finding and trial of indictments. If this indeed were true, the question would be presented in a shape different from what it now is; but it is not shown to be true by any proof whatever. An excuse for not making any is offered on the allegation, that the only mode of proving that fact would be by subjecting the commissioners of the court to the test of an oath, and they would refuse to answer lest they might be made liable to indictment under the aforesaid act of Congress, and the Court is asked to make the inference of exclusion from the circumstance that the prisoner has sworn to it, and that in point of fact no negroes are upon either panel. Now, if the Levy Court were a body holding secret sessions for the transaction of its duties, there might be some force in the suggestion; but as we know, as citizens, and may notice judicially as a matter of common knowledge, to say nothing of the fact that

it is the most important tribunal for the regulation of our purely local concerns which the State has, and one which in one way or another almost every citizen has business with, the proceedings of the Levy Court are necessarily public, and in point of fact, as we have reason to believe, are always transacted before such as choose to attend; except only in the case of making appointment of collectors of taxes and constables, at the sessions in February and March. Why, then, should there be any real difficulty in making the proof if such existed? The clerk of this court is the clerk of that court, attending at and assisting in the transaction of all its business; he might have been examined in support of the prisoner's affidavit; that court has a bailiff also, who necessarily is with it at all its sessions. Either of these could have been examined to tell what he knew of the matter, and also to say whether at the time the selection of the jurors was made the court acted in close seclusion. We cannot, therefore, infer that the Levy Court excluded colored men from the juries simply because there are none of them upon either; nor can we assume that at the time, or before the selection, there had been or was any purpose of the Levy Court to select none but white men.

That none but white men were selected is in no wise remarkable in view of the fact—too notorious to be ignored—that the great body of black men residing in this State are utterly unqualified by want of intelligence, experience, or moral integrity to sit on juries. Exceptions there are, unquestionably; but they are rare, and so much so that it is not often that more than one colored man appears upon a panel in the United States courts which have the whole State to select from; whereas in this case the selection was confined to a single county. And in support of the suggestion of unfitness, we have the fact that though the constitutional amendments and the legislation "appropriate" to carry it into effect have been in force, the former for about fifteen years and the latter for over five years, yet no instance has yet occurred where parties to a proceeding, and they are very

often colored men, have ever selected a man of African descent as a referee. This fact is not to be disregarded in assigning a cause for the exclusion of negroes from juries, if such exclusion could be shown to have been made. With our knowledge as men of the state of the African race in Delaware, and of the circumstance just referred to, it would be wholly unwarranted in us to infer exclusion for the mere reason of color, because our juries are in point of fact composed of white men alone; or to entertain a suspicion of such cause, unless it had better support than the wholly unsupported affidavit of the defendant. To impute to the Levy Court a purpose to do otherwise than perform their duty by the selection of "sober and judicious" persons to serve upon the juries, as the law requires, would be a wrong on our part, upon the well-known principle that, in the absence of proof to the contrary, a public officer discharging an official obligation or function is to be presumed to have done it faithfully according to law.

This is a case of challenge to the whole array, or body, of the grand and petit jurors; in other words, an exception to the whole of them, and for the reason that the Levy Court excluded negroes from them because of their color. Now, wherein does such an objection differ, in its quality, from that of partiality? Exclusion because of color, selection because of partiality, are alike matters of fact, to be established by some proof at least, and not by mere suspicion, on the belief of him who moves to quash an array. As a Court would not quash an array upon an allegation, or affidavit of partiality, without proof of a satisfactory kind to support it, or warrant a suspicion that the charge was true; so it ought not to quash jury panels because colored persons are not upon them, without some sufficient proof that the names of none of them were put into the box from which the jury was drawn, because of their color alone. There is no such proof here, and therefore the motion to quash must be refused.

The motion to remove this case into the Circuit Court of the United States for trial there under the provisions of sec-

tion 641 of the Revised Statutes of the United States, is upon the ground that the laws of this State forbid the selection of colored persons to serve upon juries, and therefore deny to that class, or prevent them from enforcing in the judicial tribunals of this State, their rights secured to them "by any law providing for the equal civil rights of citizens of the United States." In the case *ex parte:* In the matter of the Commonwealth of Virginia, and J. D. Coles, petitioners, the Supreme Court of the United States decided that the Act of Congress of March 1st, 1875, which enacts that "no citizen possessing all other qualifications which are or may be prescribed by law shall be disqualified from service as grand or petit juror in any court of the United States or of any State, on account of race, color, or previous condition of servitude," &c., is constitutional. We must, therefore, so treat it; and we do so treat it without the least demur; because of the original provision of the Constitution of the United States in which untrammeled, free, independent, political societies acquiesced, that such "constitution and the laws of the United States which shall be made in pursuance thereof, and all treaties shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the constitution or laws of any State to the contrary notwithstanding."

The Supreme Court of the United States, which was created by that Constitution to determine, ultimately, all questions arising under such constitutions or laws, has decided that the statute quoted was made in pursuance of constitutional power in Congress; and, therefore, whatever private opinions any of the members of this court may hold with respect to the means taken, or time chosen, to affix to such constitution the amendment which sanctions the act of Congress concerning the selection of jurors in the State courts, we must still treat such statute as being as much supreme law, for this case, as if it were part of the fundamental law of the United States. There is no room for doubt upon this question, and description of it would, therefore, be not only unnecessary,

but a waste of labor and time. The law is valid; and we have nothing to do with its consequences, however we may think them degrading to the good name and fame, no less than to the dignity of the State. Until it were plain that justice in the courts of a State had been or inevitably would be denied to a citizen because of his mere race or complexion, it would seem that the States of the Union might have been spared the mortification of a statute to compel a departure from the course of selecting jurymen to try causes between man and man, which all usage had heretofore sanctioned. Would there have been no risk to any but blacks, in leaving things as they were? Could nothing be trusted, for a time, at least, until such trust should prove to be unsafe, to people who had never been accused of discriminating as the American people had not been in their function of justice, against a man because he was not white, when the courts were called upon to sustain or protect his rights? It is deplorable that those at the time having the power for that purpose should have used it to carry out ends of their own, however, in their judgment, good, when they could not have been otherwise than sure that, in so doing, they were taking advantage of others, by reason of their necessities. Still our duty is to uphold the law of the land, for whatever reason enacted; but, as a co-ordinate branch of State government, it would be unworthy of us not to point to the wrong inflicted upon the State by the paramount law against the adoption of which she, with the courage her feebleness makes the more admirable, protested against.

We are bound by the supreme law; but we none the less may speak of its effect upon the dignity of a State; and nothing is hazarded in saying that if it had been dreamed of in '87 that the government, then to be created, would, at any time, or in any emergency, be clothed with such enlarged powers as for any reason would warrant the mere creatures of the then proposed creators to enter into and govern their purely domestic affairs, such as by the designation of fit persons to try questions of fact between man and man in the courts, to give

testimony on such occasions, and decide questions of law arising in such trials, (for the decisions of the Supreme Court cited to us justify such construction of the amendment and statute,) no constitution. such as that made then, would even have been adopted. When a State ceases to have the power to regulate her own purely local or domestic affairs, according as she chooses, there will also cease to be any meaning in the expression of the 10th article of the amendments—that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." It is very offensive to a State that a mere majority of Congress, with the sanction of the President, can pass a law subverting her whole system for the decision of questions of fact and law, by the creation of other judges of fact and law than she has seen fit to admit into her policy, with respect to the doing of justice. A State is like a private family, the members of which are justly sensitive to any invasion of their right to govern themselves in their own way, so long as they do not invade or otherwise injure the rights of those not belonging to it. She resents, as she has the right to do, attempts from whatever quarter to reform its mode of governing herself.

Returning to the point—that our laws forbid the selection of colored persons as jurors. We answer this by saying that we have no such laws. The prisoner's counsel, with the candor that becomes all members of the bar, being a recognition by them of their fidelity to the court, admits that the mere statute law of Delaware does not exclude colored men from serving upon juries; but, as the constitution of the State has a provision confining the right to vote to white persons, and the statute about jurors authorizes to be selected only such as can vote at State elections; therefore, he insists, the law of the State excludes colored persons as jurors, for the statute and the constitution, being *quoad hoc*, *in pari materia*, are to be taken as parts of one whole and the latter read as if the words *provided they are white* had been interpolated in our statute (chapter CIX of juries) between the words per-

sons and qualified in the first section thereof, (Revised Code, page 356.) This view presented by him is justified by the mere language of the act of Congress providing for removal, but not by the settled law of construction and interpretation of statutes, and the Supreme Court in the case *ex parte:* In the matter of the Commonwealth of Virginia, petitioner virtually treated the provision as not conferring the right, unless it could be shown that there was practical denial of equal rights and protection of them, in the matter of juries, to the colored man. In the case of Taylor Strauder, plaintiff in error, vs. the State of West Virginia, this appeared—a statute of that State having been passed on the 12th of March, 1873, long after the Twelfth amendment was adopted, and which act the State court had decided to be constitutional. The Supreme Court, however, declared it to be in conflict with the Constitution, as they were compelled to do, in view of the decision by the State court upholding the statute. But how is it in this State? The learned counsel for the prisoner, while admitting that our statute makes *per se*, no discrimination; yet that as by it taken with the constitutional provision only persons qualified to vote at a general election can be jurors, therefore the constitutional provision is part of the statute, and the latter is to be construed by reference to it. There is a very obvious answer to this argument.

It is a rule or principle of law, of ancient establishment, that where the provisions of a statute are inconsistent with, or repugnant to those of a later statute, the former statute is repealed in whole or *pro tanto*, according as the inconsistency may extend. If one whole act is inconsistent with a provision or part of a later act, the whole act is repealed by such part. This is settled law. Apply it to the case before us. The Constitution of the United States, and the acts of Congress passed in pursuance of it, are the supreme law of the land: There could have been no Federal republican government with such a feature. Such Constitution and laws are such supreme law, notwithstanding any State constitution, even to say nothing of State laws to the contrary.

The Fourteenth amendment, therefore, and the act of 1875 passed by Congress as appropriate legislation for its enforcement, or either, are superior to our State constitution, and it had to give way to them, and it did so give way, and was repealed, so far as the word "white" is mentioned therein as a qualification for a voter at a general election, as soon as the amendment was proclaimed to be adopted, and has been so understood and treated by all persons in this State from that time forth. Ever since the last civil rights bill was passed by Congress, negroes have been admitted as witnesses in all cases, civil and criminal, tried in our courts: whereas before they could give no evidence in any such cases against a white person except in case of crime, and to prevent a failure of justice, when no white person was present at the time of the transaction competent to give testimony. There is, then, an excision or erasure of the word white in the qualification of voters in this State; and the constitution is now to be construed as if such word had never been there. We have, then, no law of this State forbidding the Levy Court to select negroes as jurors, because they are negroes, if in their judgment they are otherwise qualified; and it not appearing to us that the present grand jury or the petit jury, though composed solely of white men, was so made up because the names of colored men were not selected for jury service on the ground of their race or color, we say that William Neal, the prisoner, has not shown that he is denied any right secured to him as a citizen of the United States, through the selection of those panels by the Levy Court; and he must therefore plead to the indictment and stand a trial.

JUDGE WALES' OPINION.

Judge Wales read a concurrent opinion, as follows:

In the Court of Oyer and Terminer—The State vs. William Neal—Wales, J.

The counsel for the prisoner has submitted several motions to the court, one for the removal of the indictment and its

prosecution into the United States Circuit Court for the Delaware District, and the others to quash the indictment and the jury panels.

These motions are founded on the affidavit of the prisoner and the acts of Congress relating to the removal of civil and criminal cases from the State to the Federal courts, and to the protection and enforcement of the civil rights of all citizens of the United States without distinction of race or color.

The Supreme Court of the United States, by recent decisions, has so clearly established the validity and objects of these laws that the present discussion is reduced to narrow limits. With the policy, expediency, or wisdom of the laws we, as judges, have nothing to do. Being in harmony with the Federal Constitution, and having received a specific interpretation by the highest tribunal in the land, they are binding upon the judges in every State, "anything in the constitution or laws of any State to the contrary notwithstanding;" and it is our duty to see that by no act of this court shall any obstacle be put in the way of their free and full operation and enforcement.

It was held in *ex parte Commonwealth of Virginia* that as the constitution and laws of Virginia do not exclude colored citizens from service on juries, the petition for removal did not present a case under section 641 of the Revised Statutes of the United States. The application now made to this court is under that section, and the prisoner's counsel has candidly admitted that if by the laws of Delaware the negro is qualified to serve as a juror, his motion for removal fails. The law of this State prescribing the qualifications of jurors requires that they shall be selected from the taxable citizens qualified to vote at the general election, and that they shall be sober and judicious persons. There is no discrimination against race or color. Certain descriptions of persons are exempted from jury service on account of their special pursuits, such as practicing physicians, ministers of the gospel and others, and also persons over seventy years of age. There is no exclusion of any one who is a voter, white or black, with the exceptions just mentioned.

The negro being a voter, and, as far as that goes, being qualified to serve as a juror, this would seem to end all discussion on this point. It is insisted, however, that we must look to the constitution of the State to ascertain who are qualified to vote, and that the constitution and the law per-

taining to the qualification of jurors, being *in pari materia*, must be construed together. By the constitution the right to vote is conferred upon free white male citizens of twenty-one years of age and upwards, and this provision, restricting the right of voting to whites and excluding negroes, still remains, in words, a part of the organic law of the State, and has not been repealed or altered by amendment, so far as the action of the State is concerned. The jury law, having been passed in the year 1851, (10 Del. Laws, 469), it is contended, had reference to the then existing condition of affairs and cannot now be made to embrace a class of persons who were not at that time recognized as voters. The law was re-enacted in the Revised Statutes of 1852, and is substantially the same to-day. (Amend. Sts. of Del., 656.) If the construction contended for by the counsel for the petitioner is the true one, then the present case would fall within the decision of the Supreme Court in Strauder vs. West Virginia, and this Court would be constrained to order the removal as prayed for. But what is the fact? For it is a well settled rule of evidence that courts are bound to take judicial notice of the public and established events of history, particularly of such well-known and notorious events as occur in their own States and within their own jurisdiction.

We know, from actual and personal knowledge of the history of the times, that since the adoption of the Fifteenth amendment to the Federal Constitution the provision in the constitution of Delaware limiting the right to vote to free white male citizens has been virtually and practically repealed and annulled, and that persons of color, otherwise qualified, have exercised and continue to exercise the elective franchise in all parts of this State with the same freedom as the whites. It is not necessary to prove this fact. We will always recognize the general laws and customs of our own State. These constitute the common law of the State, and do not require special statutes to enforce them. We have a striking illustration of the effect of the late amendments to the Federal Constitution, and which is known as the "Civil Rights Law" upon the law and evidence in this State. Prior to the Fourteenth amendment and the passage of the "Civil Rights Law," negroes were not admitted to give testimony in our courts except under special circumstances. They were excluded from the witness stand except in a few specific cases. (Amend. Sts. of Del., 651.) What is the fact now? The law of the State excluding them is unrepealed by the Legis-

lature of the State, but "the supreme law of the land" has wiped out that discrimination against every person on account of race or color, and negroes have been for years past, and still are, admitted as witnesses in our courts, subject only to the same restrictions as apply equally to all tne inhabitants of the State.

But there is really no difficulty in reaching the conclusion that under the law regulating the selection of jurors the colored citizen is not excluded. That law was intended by its authors to be prospective in its operation and effect and to include all who would become voters after its passage, as well as the class of persons who were then entitled to vote. It was not a temporary statute, intended only to provide for the then existing state of things, but to reach forward and make one unvarying standard for the qualification of a juror, to wit, that he should be qualified to vote at the general election. This was not the sole standard, but it is the only one pertinent to the discussion of the motion to remove. Whoever, thereafter, might become qualified voters in the State, whether by virtue of amendment to its constitution or by virtue of "the supreme law of the land," that overrides and supplants State constitutions and State laws, *eo instanti* became qualified for selection and service as jurors. Indeed, we did not understand the petitioner's counsel to assume that the persons entrusted with the duty of selecting names for grand and petit jurors are prohibited by the law from placing in the boxes the names of colored voters. We are convinced that the law does not work any such prohibition. On the contrary, we think that the officers who select the names of persons who are to serve on juries are at perfect liberty, under the law, to choose colored voters as well as white voters, having respect in the selection to moral and intellectual fitness only. If this view be correct the application for a removal must be refused.

In this conclusion we are sustained by high authority. For, says Mr. Justice Strong, in delivering the opinion of the Court in Strauder vs. West Virginia, "the question is not whether a colored man, when an indictment has been preferred against him, has a right to a grand or petit jury composed in whole or in part of persons of his own race or color, but it is whether in the composition or selection of jurors by whom he is to be indicted or tried, all persons of his race or color may be excluded by law, solely because of their race or color, so that by no possibility can any colored

man sit upon the jury." By the law of West Virginia white citizens only were liable to serve as jurors, and all others were excluded. The law was susceptible of no other construction or meaning. It is plain and unequivocal in its terms. The Supreme Court of that State had pronounced the law to be constitutional, and not in conflict with the Fourteenth amendment; also that it did not fall within the provisions of section 641 of the Revised Statutes, so that by no possibility could any negro sit on a grand or petit jury, although his character may have been above reproach, and he may have combined the highest wisdom with the purest morals. But such is not the effect of the law of Delaware, construed independently of our State constitution, as it can and should be; nor construed with reference to that instrument does it discriminate against the colored man, because virtually and practically the word white has been erased by the adoption of the Fifteenth amendment to the Federal Constitution, and has no longer any vital force or existence.

This petition has been skillfully drawn, so as to prevent a proper case for removal under section 641 of the Revised Statutes, but we do not gather from anything that is contained in the several opinions of the Supreme Court, which were so frequently cited in the course of the argument, that this court is to be concluded by any statement of facts that a defendant under indictment may feel justified in swearing to. We understand the ruling to be that when an application to remove a cause (removable) is made in proper form, and no objection is made to the facts upon which it is founded, it is the duty of the State court to proceed no further in the cause, and every step subsequently taken in the exercise of jurisdiction in the case, whether in the same court or in the Court of Appeals, is *coram non judice*. (Gordon vs. Longest, 16 Pet., 97, and Insurance Company vs. Dunn, 19 Wall., 214, cited by Justice Strong in *ex parte* Com. of Va.)

This is in accordance with daily practice. The court must have some assurance of the truth of the facts alleged by a petitioner before granting his application, and in a case like the present one, when an order once made and issued is irreversible, more than usual caution is required in the examination of the petition. If when a *prima facie* case for removal is made out, this court cannot look beyond the affidavit for information or proof of the facts stated therein, we would be deprived of all discretion in the matter. In that event,

it would only be necessary for a person under indictment, in order to obtain the removal of its trial to the Federal court, to draw up a petition in due form, presenting a statement of facts, real or feigned, so as to make up a case under section 641, and the order for removal would follow in course. The expression of such a doctrine is sufficient to refute it.

2. The motions to quash.

These motions are founded on the allegation by the petitioner that the Levy Court, to whom was assigned the duty of selecting the names of persons to serve as jurors, if summoned, during the current year, did designedly and wilfully exclude all names of colored persons because of their race and color, so that by reason of said exclusion the petitioner, in the finding of the indictment against him, has been, and in the trial thereof will be, denied the equal protection of the laws, and will not have the full and equal benefit of all laws and proceedings in the State of Delaware for the security of his person as is enjoyed by white persons; and that he cannot enforce in the courts of this State a right secured to him by the law of the United States providing for the equal rights of citizens of the United States, to wit: the equal protection of the laws. The gravamen of this allegation is that the petitioner was not lawfully indicted, because persons of color were, on account of their color, excluded from the grand jury which found the indictment, and that he cannot have a fair and lawful trial by a petit jury in this court for a similar reason.

In considering these applications the principle decided by the Supreme Court must be kept constantly before the mind, namely, that the colored citizen is not entitled to have a mixed jury; that is, a jury composed in any particular proportion of colored to white men. The right secured to the colored man under the Fourteenth amendment and the Civil Rights Laws, is that he shall not be discriminated against solely on account of his race or color, and it follows that no State law can for that cause alone exclude him from the jury box, nor can a State officer be permitted in the performance of his official duties, to purposely keep the colored man off the jury lists.

Admitting, then, that the Levy Court did not at its annual meeting in March last select the names of any colored persons having the right to vote and being otherwise qualified to serve as jurors, the only question is did the Levy Court purposely discriminate against them on account of their race

or color? As in the discussion of the motion to remove, so here we start with the proposition that if the allegation be true that the names of colored persons having the right to vote, and being otherwise qualified to act as jurors, had been intentionally kept out of the jury boxes, because of race or color, then the motions to quash should be granted. But here, also, we must investigate the facts, assuming that we have the right to do so.

The qualification of a juror is not simply that he should be entitled to vote, but the law requires that he should be a "sober and judicious" person. These are not unmeaning terms. They are meant to describe the class from which jurors should be selected; that is, from the dispassionate, sober-minded, wise and prudent class, from those who act according to sound judgment, and are directed by reason and wisdom. These are the authorized definitions of these terms. (Web. Dic.) The law of the Three Lower Counties, passed in the fifteenth year of George II, provided for the attendance of twenty-four of the most able, sufficient and substantial freeholders, to serve as grand jurors, and forty-eight of the most discreet and judicious freeholders, to serve as petit jurors. (1 Del. Laws, 241.) In 1811 an act was passed by the General Assembly of the State to regulate the summoning of jurors, and required that the grand jurors should be sober, substantial, and judicious freeholders, lawful men of fair characters, &c., and that the petit jurors should be sober, discreet, and judicious freeholders, &c. (4 Del. Laws, 447.) The act last referred to was repealed in 1849, and the law relating to the selection of jurors was then enacted, which, with a few alterations by subsequent legislation, still remains in force. (10 Del. Laws, 421.) Except, then, that under the old statutes jurors were required to be freeholders, and of the white race, their qualifications for the office have remained substantially the same from the first organization of our courts.

What, then, is the duty of the Levy Court in making choice of the persons from whom are to be drawn the jurors in any current year? That this duty may be occasionally executed in a careless or perfunctory manner, and in consequence men are sometimes sworn to serve as jurors who do not come up to the standard of "sober and judicious persons" as just defined, furnishes no excuse for disregarding that standard, nor does it justify the claim that every qualified voter has the right to serve as a juror, without respect to his character for

sobriety and sound judgment. The members of the Levy Court in the several counties of the State are generally selected from the best and most substantial citizens of their respec-hundreds, and by reason of their social positions and their experience in the affairs of life and business transactions they have the fullest opportunities of acquiring a personal knowledge of the members of the communities which they represent. They take a solemn obligation to perform their duties faithfully, truly, and diligently, and to do equal right and justice according to the best of their skill and judgment.

The Levy Court, at its annual meeting in March last, selected the lawful number of persons to serve as grand and petit jurors, if summoned, for the ensuing year, and in doing so excluded, designedly as it is alleged, all persons of color, otherwise qualified to serve as jurors, because of their race and color. Is this a fact? Admitting that no names from this class of persons were placed in the jury boxes, in March, does it follow, as charged in the petition, that they were excluded by reason of race or color prejudice? We cannot with certainty answer this question affirmatively. We might suspect the charge to be true, but suspicion is not a proper element of judicial determination, and we have valid and sufficient reasons for believing that the names of colored persons may have been left out, without any prejudice or bias operating in the minds of those who made the selection. It is true that up to the present time no negroes have been summoned to serve on juries in the courts of this State, and the inference might be drawn that this is the result or consequence of color prejudice, and the inference would be irresistible if the fact could not be accounted for in any other way. But what has hitherto been the condition of the colored race in our midst? By no fault of their own, the negroes, at the close of the civil war in 1865, were an ignorant, inexperienced class, poor in estate, and possessed of only industry and freedom with which to gain a livelihood and to make their way in the world. The unfriendly, not to say oppressive, legislation of the State had debased and degraded them, and shut them out from nearly all the avenues of trade and business that were opened to the whites. They were not found among the merchants or manufacturers, or among skilled mechanics and citizens, and rarely among owners or renters of farms.

The slaves worked for their masters and the free supported themselves by accepting employment as common laborers, or

by the performance of menial service. The emancipation proclamation and the adoption of the Fourteenth and Fifteenth amendments to the Federal Constitution delivered them from servile bondage and from the almost equal subjection to destructive State laws. They were invested with all the rights and privileges of citizenship, but they were not and could not be in a moment released from the fetters of ignorance, and as by the wand of a magician lifted up to an intellectual and moral equality with their white fellow-citizens. Nothing short of a miracle could have wrought such a change. The Fifteenth amendment was adopted in 1869. Have the colored citizens since that year made such solid advancement in education, in business experience, and in practical knowledge of the laws and customs of the State, and have they acquired that character for sober-mindedness, prudence, and wisdom which would make them safe and useful jurors? That here and there a representative of their race is to be seen who may be said to possess these qualities in a commendable degree is undoubted, but the number of such is so small as to prove the prevalence of a general rule to the contrary. If it be asked when will colored people as a class be qualified to serve on juries, it may be answered when they shall have reached a relative equality with the whites in education and business experience.

The Supreme Court in the Strauder case, very clearly decides that a State may prescribe such qualifications for jurors as it may see fit, so that no discrimination be made against race or color. The selection of jurors may be confined to freeholders, or to those who possess certain educational attainments, and these needed qualifications may be fixed as high as the Legislature may see proper.

In the course of the argument it was estimated that the proportion of colored voters to white voters in New Castle county is as one to five, but it was not even suggested, even by those who advocate the summoning of colored jurors, that the colored jurymen should bear a like proportion to the white jurymen, for no one will attempt to deny that of the whole number of voters the proportion fit to act as jurors is much smaller in the former than in the latter class. Here, then, would be a practical difficulty at the outset in ascertaining the just proportion between the two races in the jury panel. The members of the Levy Court, if they found colored voters otherwise qualified, would have to make the calculation.

But our present inquiry is as to the duty of the Levy Court in selecting jurors and the intent with which they performed that duty in March last. We have already pointed out the description of persons designated by law as quailified for jurors, and have endeavored to explain the lack of the required qualifications on the part of the colored citizens; and we are not willing to impeach the official integrity of the Levy Court in charging them with wilfully and purposely keeping off the names of colored voters from the jury panels, because of their race and color, when other good and sufficient reasons can be assigned for the exclusion, to wit: their fewness in number, their want of education, their inexperience and incompetence. The Levy Court acted in the performance of a discretionary duty, and it was held in *ex parte* Commonwealth of Virginia. A mandamus does not lie to control judicial discretion, except where that discretion has been abused. We are not prepared to say that the Levy Court as a body, or that its individual members, abused their discretion. There is no satisfactory evidence that they did so. If, then, we have established the fact that the law of the State does not discriminate against the colored citizens in the composition of the juries, and that the officers, whose duty it was to select the names from which the juries are to be drawn, did not violate the law, the motion to quash must also be refused. This, we understand to be the law as decided by the Supreme Court in the case last cited, when it says:

"If * * * the officer to whom was entrusted the selection of the persons from whom the juries for the indictment and trial of the petitioners were drawn, disregarding the statute of the State, confined his selection to white persons, and refused to select any persons of the colored race, solely because of their color, his action was in gross violation of the spirit of the State's law, as well as the act of Congress of March 1, 1875, which prohibits and punishes such discrimination." Again, quoting from the same opinion of the court in the same case: "The assertions in the petition for the removal, that the grand jury by which the petitioners were indicted, as well as the jury summoned to try them, were composed wholly of the white race, and that their race had never been allowed to serve as jurors in the county of Patrick in any case in which a colored man was interested, fall short of showing that any civil right was denied, or that there had been any discrimination against the defendants

because of their color or race. The facts may have been as stated, and yet the jury which indicted them and the grand summoned to try them, may have been impartially selected. In the matter before this court the petitioner has made out a *prima facie* case on the facts as stated by him, but, as has already been said, these alleged facts require confirmation, and we think we have shown that the grand jurymen who indicted William Neal, and the petit jurymen who may have to try him, have been impartially selected.

The order for a removal of the case having been denied for the reasons submitted, it is unnecessary to consider the power of the United States Circuit Court to try offenses against the State laws, or the mode of trial, or the disposition of the prisoner in the event of a conviction. In a proper case for removal, those difficulties, if difficulties they be, would have to be met and overcome by the Federal court.

The prisoner's counsel has done nothing more than his duty in making these motions. It is his duty to do all in his power to protect the rights and interests of his client, who is now in jeopardy, and if he is not content with the judgment of this court, he has a remedy by invoking the supervisory authority of the Supreme Court of the United States.

Judge Houston concurred in the opinions given, and spoke briefly to the following effect:

"I have carefully considered the cases that have been cited and which have been adjudicated in the courts of the United States, and have come to the conclusion that that case does not come within the ruling in any one of them, and, until the courts of the United States are prepared to go further, I do not feel bound to go any farther than they have done.

"With regard to the application I must say, however, that the very first sentence in the petition surprised me exceedingly. The petitioner is made to say, in the face of this tribunal, that the colored man is not a voter in this State by the constitution and laws of this State, which is not true and ought not to be asserted; because there is not a lawyer in the State, of any political party, that has ever doubted, since the adoption of the Fourteenth amendment to the Constitution of the United States, that the word 'white' in our Constitution was utterly stricken out. That goes to the root of the whole matter, and there is no discrimination in the constitution or laws of our State against colored men as jurors.

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Supreme Court of the United States

OCTOBER TERM, 1880.

No. 865.

WILLIAM NEAL, PLAINTIFF IN ERROR,

vs.

STATE OF DELAWARE, DEFENDANT IN ERROR.

BRIEF FOR DEFENDANT IN ERROR.

In Error to the Court of Oyer and Terminer of the State of Delaware, sitting in and for New Castle County.

BRIEF FOR DEFENDANT IN ERROR.

GEORGE GRAY,
Attorney General.

FERRIS BROS., PRINTERS, WILM., DEL.

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WILLIAM NEAL, PLAINTIFF IN ERROR,

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STATE OF DELAWARE, DEFENDANT IN ERROR.

BRIEF FOR DEFENDANT IN ERROR.

The statement of the case sufficiently appears in the printed Record, and the Brief of the Plaintiff in Error.

The assignments of error by the counsel for the plaintiff in error — eleven in number — cover but two general objections to the record and proceedings in the case before the Court.

1st. That the Court below erred in deciding that the petition of the defendant, William Neal, praying for the removal of the indictment and prosecution into the Circuit Court of the United States for the District of Delaware, did not state facts that brought the case within the provi-

sions of Section 641 of the Revised Statutes of the United States.

2d. That the Court below erred in refusing to grant the motion of the said defendant to quash the indictment, and the lists and panels of the grand and petit jurors.

I.

The constitutionality of Section 641 of the Revised Statutes having been passed upon and settled by this Court in the cases of (Strauder vs. West Virginia, 100 U. S. 303, and Virginia vs. Rives, Id. 313,) we have only to consider whether the Court erred in deciding that the defendant had not by his petition for removal, brought himself within the provisions of said section.

The parts of said section applicable to the case in hand are as follows:

"When any civil suit or criminal prosecution is commenced in any State Court, for any cause whatsoever, against any person who is denied or cannot enforce in the judicial tribunals of the State, or in the part of the State, where such suit or prosecution is pending, any right secured to him by any law providing for the equal civil rights of citizens of the United States, * * * * such suit or prosecution may, upon the petition of such defendant filed in said State Court at any time before the trial or final hearing of the cause, stating the facts, and verified by oath, be removed, for trial, into the next Circuit Court to be held in the district where it is pending."

By the express requirement of the statute, the petition

must set forth the facts upon which the defendant bases his claim to have his case removed. The mere filing of the petition is not enough, but the facts set forth must be such as to justify a removal, and the sufficiency of said facts is a material inquiry for the Court. (Virginia vs. Rives, 100 U. S. 317.)

The denial, or inability to enforce, in the judicial tribunals of a State, rights secured by any law providing for the equal civil rights of all persons, citizens of the United States of which Section 641 speaks, is a denial of such rights, or inability to enforce them, resulting from the Constitution or laws of the State, rather than a denial, first made manifest at the trial of the cause, "In other words, the statute has reference to a legislative denial, or an inability resulting from it." (Virginia vs. Rives, 100 U. S. 319.)

And Mr. Justice Strong, in delivering the opinion of the court in the same case, says:

"The Constitutional amendment is broader than the provisions of that section (641). The statute authorizes the removal of the case only before trial, not after a trial has commenced. It does not therefore embrace many cases, in which a colored man's rights may be denied. It does not embrace a case in which a right may be denied by judicial action during the trial, or by discrimination against him in the sentence, or in the mode of executing the sentence. * * * It is, then, during or after the trial, that denial of defendant's right by judicial tribunals occur. Not often until then. Nor can the defendant know until then, that the equal pro-

tection of the laws will not be extended to him. Certainly until then he cannot affirm that it is denied, or that he cannot enforce it, in the judicial tribunals. It is obvious, therefore, that to such a case—that is, a judicial infraction of the Constitutional inhibitions after trial or final hearing has commenced — Section 641 has no applicability. It was not intended to reach such cases. * * * * In other words, the statute has reference to a legislative denial, or inability resulting from it."

The statement of facts, contained in the petition of the defendant, for the removal of his case from the State Court, may be reduced to two general allegations :

1st. That all persons of color had been excluded from the jury lists *by the Levy Court*, by reason of their color.

2d. That by the Constitution and laws of Delaware, persons of color were excluded from the jury lists, and that the petitioner was therefore denied, and could not enforce in the judicial tribunals of the said State, a right secured to him by the law of the United States, &c.

Under the construction given to Section 641 by this Court in the case above referred to, the first allegation, even if true (and no proof whatever was offered in support of it), apart from the second, does not furnish sufficient ground for removal, because it cannot be said to have been such "a denial, or disability to enforce in the *judicial tribunals of the State*" the rights of colored men as is contemplated by the said Section 641. (Virginia vs. Rives, 100 U. S. 321.)

The members of the Levy Court, by so discriminating against colored persons, would have abused their authority, and been liable to punishment, "But it would have been "a criminal misuse of the State law," and not a ground for removal. In the case last cited, page 321, this Court says:

"It is to be observed that act (§641) gives the right of re- "moval only to a person who is denied or cannot enforce, in "*the judicial tribunals of the State*, his equal civil rights." And this is to appear before trial. When a statute of the State denies his right, or interposes a bar to his enforcing it, in the judicial tribunals, the presumption is fair that they will be controlled by it in their decisions; and in such a case a defendant may affirm on oath what is necessary for a removal. Such a case is clearly within the provisions of Section 641. But when a subordinate officer of the State, in violation of State laws, undertakes to deprive an accused party of a right which the statute law accords to him, as in the case at bar, it can hardly be said that he is denied or cannot enforce "in the judicial "tribunals of the State" the rights which belong to him.

* * * * If, as in this case, the subordinate officer, whose duty it is to select jurors, fails to discharge that duty in the true spirit of the law; if he excludes all colored men, solely because they are colored; or if the Sheriff, to whom a *venire* is given composed of both white and colored citizens, neglects to summon colored jurors only because they are colored; or if a clerk, whose duty it is to take the twelve names from the box, rejects all the colored jurors for the same reason,—it can with no propriety be said the defendant's right is denied by the State, and cannot be enforced in the judicial tribunals. The Court will correct the wrong, will quash the indictment or the panel, or, if not, the error will be corrected

in a superior Court. *We cannot think such cases are within the provisions of Section 641.* Denials of equal rights in the action of the judicial tribunals of the State are left to the revisory powers of this Court."

We have quoted at length from the opinion of the Court in the case referred to, because the reasoning of the Court precludes the necessity of further argument on this point; and it is therefore submitted, that unless the second general allegation of the petition, to wit, that colored persons were excluded from the grand and petit juries *by the Constitution and laws of the State of Delaware*, be true, then the petition for removal has stated no facts that brought the case within the provisions of Section 641.

Were then, colored persons, at the time of the filing of this petition for removal, so *excluded* by the laws of Delaware?

We might rest the case on the answer to this question given by the Court below:

Because it is well settled, that this Court will take the decision of a State Court of last resort, not called in question by any conflicting decision, as conclusive evidence of what the law of the State is. (Randall vs. Brigham, 7 Wall. 523.)

It is not here, a question of this Court being bound, by the decision of a State Court, as to the Constitutionality of a *particular law;* but what will be the *best evidence*

to this Court, as to what the law of the State, which it is called upon to consider, *actually is.*

This Court must be first *certified,* in some way, *as to what is the law of a State,* on which it is called upon to pass, and then it can say whether or not it denies, or creates an inability to enforce, upon the part of this defendant, his equal civil rights, etc.

The statute of Delaware in regard to jurors, does not sufficiently answer the question, according to the contention of the learned counsel for the defendant, but we are called upon to follow him through an ingenious course of dialectics, by which he reaches the conclusion that colored persons are excluded from the jury by the Constitution and laws of Delaware.

(As a matter of fact, they are not so excluded, as we will hereafter show, and the learned counsel would not affirm that they are; he merely constructs a syllogism with assumed premises and an artificial conclusion.)

And yet there is nowhere on the statute book of Delaware, any law expressly excluding colored persons from liability to serve as jurors. It is a matter of construction. Whose construction must we take as the correct one, that of the learned counsel or that of the State Court?

We submit therefore, that when this Court is called upon to say whether the allegation of defendant's petition, that the law of Delaware excludes colored persons from

the jury, by reason of their color, in consequence of which he is denied, or cannot enforce in the judicial tribunals of the State, his equal civil rights, etc., be true or not, it must take the decision of the Delaware Court, as to the *fact*, whether or not there is such a law excluding colored persons, as conclusive.

The contention is not, that this Court is bound by the decision of the State Court, that a law excluding colored persons from juries is constitutional or unconstitutional, but that the decision of the State Court as to what the law of the State *actually is*, is binding in the sense that it is the *evidence* of a *fact*, which is the fact to be dealt with by this Court — *i. e.*, the *fact* being established, it is for this Court to say, how it affects the rights of the defendant secured to him by the Fourteenth Amendment, and by Section 641.

Thus in the case of Strauder vs. West Virginia, there was no dispute about what the law of Virginia was. It in terms excluded colored persons from the juries, and the State Court declared the law not in conflict with the Constitution of the United States. This Court dealt with the law as evidenced before it, as *the fact* of the case, admitted on all sides. And it decided that by that law, one of the rights protected, or created, by the Fourteenth Amendment, was denied the defendant in the State Court, and that his petition for removal was within the provisions of Section 641. (And yet the learned counsel for the defendant says that there is no difference between the case of Strauder vs. West Virginia and this case!)

What then is the answer of the Delaware Court, to the question whether colored persons are excluded by the law and Constitution of the State, from juries? Chief Justice Comegys in delivering the opinion of the Court refusing to grant the petition of the defendant for removal, on the ground that the facts stated did not bring the case within the provisions of Section 641, says:

"Returning to the point—that our laws forbid the selection of colored persons as jurors. *We answer this by saying that we have no such laws.* The prisoner's counsel, with the candor that becomes all members of the bar, being a recognition by them of their fidelity to the court, admits that the mere statute law of Delaware does not exclude colored men from serving upon juries; but, as the Constitution of the State has a provision confining the right to vote to white persons, and the statute about jurors authorizes to be selected only such as can vote at State elections; therefore, he insists, the law of the State excludes colored persons as jurors, for the statute and the constitution, being *quoad hoc, in pari materia*, are to be taken as parts of one whole, and the latter read as if the words *provided they are white*, had been interpolated in our statute (Chapter 109 of Juries) between the words *persons* and *qualified*, in the first section thereof (Revised Code, page 356.) This view presented by him is justified by the mere language of the act of Congress providing for removal, but not by the settled law of construction and interpretation of statutes. And the Supreme Court in the case *exparte:* in the matter of the Commonwealth of Virginia, petitioner, virtually treated the provision as not conferring the right, unless it could be shown that there was practical denial of equal rights and protection of them, in the matter of juries, to the colored man. In the case of Taylor

Strauder, plaintiff in error, vs. the State of West Virginia, this appeared—a statute of that State having been passed on the 12th, March, 1873, long after the 14th amendment was adopted, and which act the State Court had decided to be constitutional. The Supreme Court, however, declared it to be in conflict with the Constitution; as they were compelled to do, in view of the decision by the State Court upholding the statute. But how is it in this State? The learned counsel for the prisoner, while admitting that our statute makes *per se*, no discrimination; yet that as by it, taken with the constitutional provision, persons qualified to vote at a general election can be jurors, therefore the constitutional provision is part of the statute, and the latter is to be construed by reference to it. There is a very obvious answer to this argument.

"It is a rule or principle of law, of ancient establishment, that where the provisions of a statute are inconsistent with, or repugnant to those of a later statute, the former statute is repealed in whole or *pro tanto*, according as the inconsistency may extend. If one whole act is inconsistent with a provision or part of a later act, the whole act is repealed by such part. This is settled law. Apply it to the case before us. The Constitution of the United States and the acts of Congress passed in pursuance of it, are the supreme law of the land. There could have been no Federal republican government without such a feature. Such constitution and laws are such supreme law, notwithstanding any State Constitution, even, to say nothing of State laws, to the contrary. The Fourteenth amendment, therefore, and the act of 1875 passed by Congress as appropriate legislation for its enforcement, or either, are superior to our State Constitution, and it had to give way to them, and it did so give way, and was repealed, so far as the word 'white' is mentioned

therein as a qualification for a voter at a general election, as soon as the amendment was proclaimed to be adopted, and has been so understood and treated by all persons in this State from that time forth. Ever since the last civil rights bill was passed by Congress, negroes have been admitted as witnesses in all cases, civil and criminal, tried in our courts; whereas before they could give no evidence in any such cases against a white person except in case of crime, and to prevent a failure of justice, when no white person was present at the time of the transaction competent to give testimony. There is then an excision or erasure of the word white in the qualification of voters in this State; and the Constitution is now to be construed as if such word had never been there. We have, then, no law of this State forbidding the Levy Court to select negroes as jurors, because they are negroes, if in their judgment they are otherwise qualified; and it not appearing to us that the present grand jury or the petit jury, though composed solely of white men, was so made up because the names of colored men were not selected for jury service on the ground of their race or color, we say that William Neal, the prisoner, has not shown that he is denied any right secured to him as a citizen of the United States, through the selection of those panels by the Levy Court; and he must, therefore, plead to the indictment, and stand a trial."

Again, Judge Wales of the same Court says:

"It was held in *exparte Commonwealth of Virginia*, that as the Constitution and laws of Virginia do not exclude colored citizens from service on juries, the petition for removal, did not present a case under Section 641 of the Revised Statutes of the United States. The application is now made to this court under that section, and the prisoner's

counsel has candidly admitted, that, if by the laws of Delaware the negro is qualified to serve as a juror, his motion for a removal fails. The law of this State prescribing the qualifications of jurors, requires that they shall be selected from the taxable citizens qualified to vote at the general election, and that they shall be sober and judicious persons. There is no discrimination against race or color. Certain descriptions of persons are exempted from jury service on account of their special pursuits, such as practising physicians, ministers of the gospel and others, and also persons over 70 years of age. There is no exclusion of any one who is a voter, white or black, with the exceptions just mentioned.

"The negro being a voter, and, as far as that goes, being qualified to serve as a juror, this would seem to end all discussion on this point. It is insisted, however, that we must look to the Constitution of the State, to ascertain who are qualified to vote, and that the constitution and the law pertaining to the qualification of jurors, being *in pari materia*, must be construed together. By the Constitution the right to vote is conferred upon free white male citizens of 21 years of age and upwards, and this provision, restricting the right of voting to whites and excluding negroes, still remains, in words, a part of the organic law of the State, and has not been repealed or altered by amendment, so far as the action of the State is concerned. The jury law, having been passed in the year 1851, (10 Del. Laws, 469), it is contended, had reference to the then existing condition of affairs, and cannot now be made to embrace a class of persons who were not at that time recognized as voters. The law was re-enacted in the Revised Statutes of 1852, and is substantially the same to-day. (Amend. Sts. of Del., 656.) If the construction contended for by the counsel for the petitioner is the true one, then the present case would fall within the decision of the Supreme Court in Strauder vs. West Virginia, and this Court

would be constrained to order the removal as prayed for. But what is the fact? For it is a well settled rule of evidence, that courts are bound to take judicial notice of the public and established events of history, particularly of such well known and notorious events, as occur in their own States, and within their own jurisdiction. We know, from actual and personal knowledge of the history of the times, that since the adoption of the Fifteenth Amendment to the Federal Constitution, the provision in the Constitution of Delaware, limiting the right to vote to free white male citizens, has been virtually and practically repealed and annulled, and that persons of color, otherwise qualified, have exercised and continue to exercise the elective franchise in all parts of this State with the same freedom as the whites. It is not necessary to prove this fact. We will always recognize the general laws and customs of our own State. These constitute the common law of the State, and do not require special statutes to enforce them. We have a striking illustration of the effect of the late amendments to the Federal Constitution, and of what is known as the "Civil Rights Law" upon the law of evidence in this State. Prior to the Fourteenth Amendment and the passage of the "Civil Rights Law," negroes were not admitted to give testimony in our courts, except under special circumstances. They were excluded from the witness stand except in a few specific cases. (Amend. Sts. of Del., 651.) What is the fact now? The law of the State excluding them is unrepealed by the Legislature of the State, but "the supreme law of the land" has wiped out that discrimination against every person on account of race and color, and negroes have been for years past, and still are, admitted as witnesses in our courts, subject only to the same restrictions as apply equally to all the inhabitants of the State.

"But there is really no difficulty in reaching the conclusion, that under the law regulating the selection of jurors the

colored citizen is not excluded. That law was intended by its authors to be prospective in its operation and effect, and to include all who would become voters after its passage, as well as the class of persons who were then entitled to vote. It was not a temporary statute, intended only to provide for the then existing state of things, but to reach forward, and make one unvarying standard for the qualification of a juror, to wit, that he should be qualified to vote at the general election. This was not the sole standard, but it is the only one pertinent to the discussion of the motion to remove. Whoever, thereafter, might become qualified voters in the State, whether by virtue of amendment to its constitution, or by virtue of "the supreme law of the land," that overrides and supplants State constitutions and State laws, *eo instanti*, became qualified for the selection and service as jurors. Indeed, we did not understand the petitioner's counsel to assume, that the persons entrusted with the duty of selecting names for grand and petit jurors, are prohibited by the law from placing in the boxes the names of colored voters. *We are convinced that the law does not work any such prohibition.*"

And Judge Houston, also of the same Court, says:

"I have carefully considered the cases that have been cited, and which have been adjudicated in the Courts of the United States, and have come to the conclusion, that, that case does not come within the ruling of any one of them, and, until the Courts of the United States are prepared to go farther, I do not feel bound to go any farther than they have done.

"With regard to the application, I must say, however, that the very first sentence in the petition surprised me exceedingly. The petitioner is made to say, in the face of this tribunal, that the colored man is not a voter in this

State by the Constitution and laws of this State, which is not true, and ought not to be asserted. This goes to the root of the whole matter, *and there is no discrimination in the Constitution or laws of our State, against colored men as jurors.*"

But though we think it established, that this Court will take the law of Delaware to be, what its own Courts without conflict say it is, let us consider for a moment independently of that evidence, what the law of Delaware as regards the qualifications of jurors is:

1st. The statute, quoted at length in the Brief of the Plaintiff in Error, bearing on this subject, provides (Revised Code, chapter 109, Section 1,) "All persons qualified to vote at the general election, shall be liable to serve as jurors; except" &c. (certain public officers and some others.)

The standard of liability to serve as juror, is the qualification to vote. We have here no *express* and fixed definition of the classes of persons who may be jurors—all *voters* are qualified as jurors—and none who are, or may be voters are excluded. The statute accommodates itself, to the present and the future, if the class of those qualified to vote is enlarged, the class from which jurors may be drawn is also enlarged.

It is true that the Constitution of the State of Delaware prescribes, or rather did prescribe, prior to the Fifteenth Amendment to the Constitution, "That every free white male citizen, of the age of twenty-two years

or upwards, having resided in the State one year next before the election, * * * shall enjoy the right of an elector." So that at the time the statute on jurors was passed, "*free white* male citizens" constituted the class entitled to vote, but that class has been enlarged, and by adoption of the Fourteenth Amendment, citizens of any color may vote, and do vote, and have voted ever since. Can any one aver then, that the statute of Delaware authorizing all persons qualified to vote, to be jurors, excludes any of that enlarged class of voters. The Legislature, in that statute did not mean to say, and did not say, that no colored person should be a juror. But they did say, that neither he, nor any one else should be a juror until, or unless, he was a voter. The statute does not even refer to the Constitution of the State; it would seem almost that it was drawn with all the possibilities of the future in view. The colored man is a voter in Delaware to-day, and has been for eight years; the learned counsel for the defendant will not attempt to deny it: he is then *included*, within the class from which jurors may be drawn, and not *excluded*.

We think then we can again affirm, notwithstanding the assertion to the contrary in the Brief of Plaintiff in Error, that the case of *Strauder vs. West Virginia* differs from this.

But, says the learned counsel for the Plaintiff in Error, though we admit that the colored men are voters in Delaware, and as such would come within the class authorized to be jurors by statute, yet they do not vote by reason

of any change in the Constitution of Delaware — and therefore the Constitution and laws of Delaware, forbid them to be jurors.

Is not this, (with all respect), the merest quibbling, dealing with words and not with things, sticking in the bark and not cleaving to the centre of the tree?

All voters may be jurors. Who are voters? The answer is plain since the Fifteenth Amendment; *all male citizens, twenty-one years of age and upwards, having certain other qualifications, may vote in Delaware, and therefore may be jurors.*

The Constitution of the United States, is as much a part of the organic law of Delaware as its own Constitution—indeed, it is the "supreme law." It pervades everywhere, like an atmosphere, and all inconsistent legislation or constitutional provisions of a State, are withered and destroyed by it. By its operation slavery ceased to exist in Delaware, and the status of the slave was changed to that of the freeman. The common law of Delaware by which the colored person could be held in slavery was abrogated by the Thirteenth Amendment of the Constitution of the United States, and no amendment to the Constitution of the State was ever made *by the State* to confirm it, nor was any such amendment ever thought necessary.

By the Thirteenth Amendment the word "free" was

practically stricken out of the clause of the State Constitution prescribing the qualification of voters, *as far as it excluded any on accouut of status*, just as the word "white" was practically stricken out, *as far as it excluded any on account of color;* though "free" persons, and "white" persons may still vote.

Would it not be just as logical to say, that by the Constitution and laws of Delaware, slavery exists to-day, as to say, that an inability to vote, and therefore to be jurors as to colored men, exists by the same Constitu tion and laws.

It is conceded, and this Court has decided, that the right of a colored man, not to have colored men excluded on account of their color from the jury which is to try him, is one of the rights secured to him by the Fourteenth Amendment, and that Section 641 of the Revised Statutes, was meant to provide against a *legislative* denial, or inability to enforce that right.

But inasmuch as this specific operation of the Fourteenth Amendment, and of the legislation to enforce it, was not *expressly and in terms* provided for in the amendment or the statute, but was the result of judicial interpretation or construction, (there having been, prior to the late decisions of this Court, a serious difference of opinion among students of the Constitution, as to the meaning of the general terms of the amendment, and as to the appropriateness of the statute to enforce it,) this Court has been

and will be careful in laying down the limitations and extent of the operation of the amendment, and of the legislative power conferred by it on Congress, to protect the rights of the States from interference unwarranted by either.

Therefore, when the protection of the amendment and the statute is invoked by this defendant against an alleged *legislative denial of, or inability to enforce, his equal civil rights*, this Court must be convinced that the alleged legislative denial is *actual*, or inability to enforce, etc., resulting from it, is *real*. These words have a meaning, and are of serious import, and are not mere counters to chop logic with.

It only remains to notice, under this head, the Eighth Contention of the Plaintiff in Error, on page 29 of this Brief. The last three paragraphs of the same read as follows:

"The right of the Plaintiff in Error, whose petition alleged the necessary jurisdictional facts, and the jurisdiction of the Circuit Court, depended not on what the Court of Oyer and Terminer might decide, but upon what the State of Delaware had enacted in its Constitution and laws."

"The right of the Plaintiff in Error to have his cause removed into the Circuit Court of the United States, having vested and become established the moment his petition was filed in the Court of Oyer and Terminer, it was not contingent, nor could it be divested by any decision of the State Court."

"By filing the petition, the jurisdiction of the State

Court was ousted, and the jurisdiction of the Federal Court attached, and could not be disturbed by any decision the State Court might make, or by any construction they might put upon the text of the Constitution and laws of the State as to the right to serve upon juries."

It may be noted here in passing, that the first paragraph above quoted is inconsistent with the last, and in a measure begs the question, in that it asserts that the right of the Plaintiff in error to remove, etc., depends "*on what the State of Delaware had enacted in its Constitution and laws*," in other words, on what the law of Delaware in the premises *actually was.*

Yet the last paragraph of the said 8th Contention asserts that the *mere filing of the petition* ousted the jurisdiction of the State Court, and worked a removal. But this could not be, if the *right of removal* depended on what the State law *actually was.* What the State law *was*, was then, and is now, the question to be determined.

The *assertion of jurisdictional facts* is necessary at the outset of a proceeding before a Court of limited jurisdiction, or whose jurisdiction depends upon exceptional facts, such as the status, official position, or residence of the parties, and the Court will not entertain the case without such assertion. If the facts are admitted or be not denied, the jurisdiction is complete. If they be denied the Court must pass upon them. But this was not the case before the court below. *They* were called upon to *divest themselves of jurisdiction*, and it was their right and their duty

to pass upon the truth of the allegations of fact, upon which the demand was made.

If the mere *allegation* of a fact, and not the *fact* itself, were sufficient to work a removal, it is easy to see to what absurd extremities the doctrine could be carried.

The statute expressly requires the petitioner to set forth the facts upon which he bases his belief that he cannot enforce his equal civil rights, in the trial about to commence, and not merely his belief that he cannot.

It does not, as in other cases of removal, provide that certain *specific facts*, (which are made by the statute the ground of removal,) shall be set forth in the petition, but merely provides that he shall file a petition "*stating the facts*," thus necessarily leaving to the State Court (subject to the revisory power of this Court,) the determination of *what* are *facts*, and their sufficiency, if they *be facts*.

Mr. Justice Strong, in *Virginia vs. Rives*, *100 U. S. 317*, says:

"In *Gordon vs. Longest*, *16 Pet. 97*, it was ruled by this Court that when an application to remove a cause, removable, is made in proper form, *and no objection is made to the facts upon which it is founded*, it is the duty of the State Court to proceed no further. * * * * It is therefore a material inquiry whether the petition of the defendants sets forth such facts as made a case for removal, and consequently arrested the jurisdiction of the State Court, and transferred it to the Federal Court."

If the truth or falsity of the allegation of the petition will appear to the Court without evidence *aliunde*, as in the case of the alleged existence of a public law or institution, or of the facts of history, of which the Court will take judicial cognizance, then the Court must be governed by its knowledge in the premises, and say in a proper case the *alleged fact* is not a *fact* at all.

As for example, if a petition to the State Court of Massachusetts should allege, as a ground for removal, that African slavery existed in that State by its Constitution and laws.

It is submitted therefore, that, as to the action of the Court below in refusing the petition for removal, the assignments of error are not sustained.

II.

To the refusal of the Court below to quash the indictment, and the panels of Grand and Petit Jurors, on the ground that the Levy Court had excluded from said juries all persons of African race and color, because of their race and color; it is assigned as error, that the Court should not have refused the motion to quash because the plaintiff in error produced no evidence in support of the allegations of his petition.

To this it will be sufficient to say that to require that the Court below should have granted this motion to quash, on the unsupported allegations of the prisoner at the bar, and when the facts alleged, were such as could

not possibly have been within his knowledge, and moreover imputed grave offences against the law, to all the persons constituting the Levy Court of New Castle County, would be to reverse all the rules of evidence, overturn all orderly procedure in Courts of justice, and contradict the settled maxims of ordinary human experience.

Says Mr. Justice Strong in the case of *Virginia vs. Rives*, so often referred to:

"The assertion in the petition for removal, that the grand jury by which the petitioners were indicted, as well as the jury summoned to try them, were composed wholly of the white race, and that their race had never been allowed to serve as jurors in the County of Patrick, in any case in which a colored man was interested, fall short of showing * * * that there had been any discrimination against the defendants because of their color or race. The facts may have been as stated, and yet the jury which indicted them, and the panel summoned to try them, may have been impartially selected."

It is submitted therefore that the assignments of error in the premises are not sustained.

III.

As to the refusal by the Court to hear evidence in support of the allegation that persons of color were excluded from the jury lists by the Levy Court, on account of their color.

The Plaintiff in Error, on page 34 of his Brief, says:

"*The Court should have permitted the Plaintiff in Error to go into proof in support of the allegations of his petition on which the motion to quash was founded, even after the motion to quash was argued and overruled.*"

Very little is said by the learned counsel in support of this contention, in their Brief.

The petition containing the allegations upon which the motion to quash was grounded, was made and sworn to by the defendant on the 13th day of May, 1880, and on that account the defendant was not arraigned until the 24th of that month. The petition was actually filed on the 20th of May, and the motion to quash, as well as the petition for removal, were argued on the 21st, and overruled on the 24th of the same month, and the defendant ordered to be arraigned and to plead, and the trial to be proceeded with.

Yet the counsel for the defendant never offered any proof of his allegations in all that time, nor availed himself of the process of the Court to compel the attendance of witnesses, if any he had; the process of the Court being open to him at all times, and subpœnas for witnesses being issuable on his order, at any time, and not *ex gratia*, on application to the Court, as the learned counsel would seem to indicate by his application after the motion to quash had been overruled.

Courts must be allowed in the conduct of a trial a discretion as to the order of proceeding, and timeliness of all motions. Appellate Courts will never interfere with

that discretion, or review the exercise of it, (where it is not alleged to have been exercised corruptly).

The Court below had an absolute discretion to fix a day for trial, and to refuse further time to allow the production of witnesses in support of a motion to quash, which they had just overruled. And their reasons for their action are set out in part, on page 16 of the printed record, to wit:

"That application for leave to summon witnesses to support a motion which had been argued, and refused because of want of proof, when sufficient time had existed for its production, was without precedent in the Court of Oyer and Terminer of this State, and therefore, in this case, the motion must be treated as coming too late to be granted."

But the reasonableness of the Court's action, and that the defendant was not damnified thereby, will further appear by the admission of his counsel * * * *that he had no proof to offer*, on page 34 of their Brief; they there say:

"Under the facts and circumstances of this case, it was not in the power of the Plaintiff in Error to produce any evidence of the intent with which the Levy Court excluded men of his race and color, from the jury lists, other than the presumptive evidence already discussed.

"No one had any knowledge of their intent except themselves, each one for himself. They were eleven in number, one for each Hundred in the County.

"If they admitted they had excluded blacks from the

list of jurors because of race and color, they subjected themselves to the penalties of the Act of Congress of March 1, 1875. (18 Stat., 336.)

"They could not be compelled as witnesses, to criminate themselves, and unless they did criminate themselves, the Plaintiff in Error could not adduce direct and specific evidence of that intent, on the establishing of which, rested his right under the Constitution, and of vital moment to him in this case."

We submit therefore that there was no error in the action of the Court in the premises.

GEORGE GRAY,
Attorney-General of Delaware.